OCTOBER TERM, 1894.

No. 18.

UNION CITY AND FORT DODGE RAILROAD COMPANY,
Complainant and Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant and
Appellant.

APPELLEE'S REPLY BRIEF ON APPEAL, WITH AN APPENDIX CONTAINING EXTRACTS FROM BRIEFS OF COUNSEL IN THE ROCK ISLAND CASE.

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SUPREME COURT OF THE UNITED STATES.

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MASON CITY AND FORT DODGE RAILROAD COMPANY,
COMPLAINANT AND APPELLEE,

vs.

UNION PACIFIC RAILROAD COMPANY, DEFENDANT AND APPELLANT.

APPELLEE'S REPLY BRIEF ON APPEAL, WITH APPENDIX, CONTAINING EXTRACTS FROM BRIEFS OF COUNSEL IN THE ROCK ISLAND CASE.

I.

In providing in the act of 1871 "for the use and protection of said bridge and property, the said Union Pacific Railroad Company shall be empowered, governed and limited by the provisions of the act" of 1866, the Congress had in mind the substantial provisions for the use of the property by other companies, and not the minor provisions of sections two and three, which are otherwise provided in the act of 1871 and in the Union Pacific charter.

Reply to appellants' contention that secs. 2 and 3, act 1866, only provisions referred to in act 1871.

On pages 36 *et seq.* and especially under the head of "*Post-routes*," the counsel classifies the particular things in the act of 1866, in reference to the use and

protection of the bridge, which they claim Congress had in mind in referring to this act. It is argued that there were three things so provided by sections 2 and 3, viz:

"(1.) In connection with the use of the bridges when built as draw-bridges." We have seen that this is not only provided for by the act of 1871, but so provided for as to conflict with the act of 1866.

"(2.) The protection of the bridges, *i. e.*, that they should be lawful structures."

It was evidently intended by section three of the act of 1866 (Appendix to our brief, p. 422) to provide that any bridges built under the provisions of the various sections of the act, should be lawful structures. This was the natural result of any bridge being built according to the law of Congress, and was entirely unnecessary in the act of 1871.

"(3). The *use* of the bridges by the Government—that they should be *post-routes*."

Let us consider this claim of the appellants under section three. It is stated by counsel that "There is no provision in the Pacific Railroad acts fully, specifically and clearly declaring that the Union Pacific bridge across the Missouri river should be a post-route and open to the use of the Government of the United States as such" (Brief, page 37). By section six of the original charter of the Union Pacific Company (Appendix, page 374) this bridge was made a post-route, and the use thereof by the Government regulated, if it was a part of the Union Pacific railroad. And by a general act of Congress in 1866 (14 Stat., 66) it was made a post-route whether it was a part of the Union Pacific road or not. This latter act created all railroads and "bridges" post-routes, so that it is immaterial whether able lawyers and jurists differed as to the Union Pacific bridge being a part of the Union Pacific road or not.

Congress could not therefore have had in mind the use of the bridge as a post-route, nor the use of the bridge by the Government for any purpose. The provision of section three of the act of 1866, providing that no higher charge shall be made for the transmission of the mails, troops and munitions of war of the United States than the rate charged for their transportation over the public highways leading to said bridge, of course could not apply. It was held by this court not to apply, because the provisions of section six of the original charter of the Union Pacific Company conflicts with it and is exclusive in providing for the use of the bridge by the Government, and the compensation therefor (*Union Pac. R. Co. v. United States*, 104 *U. S.*, 662; *Union Pac. R. Co. v. United States*, 117 *U. S.*, 355).

But it is urged that at that time it was not known that the eastern terminus of the Union Pacific road was in Iowa, and that therefore one of the objects Congress had in mind in referring to the act of 1866 was to create it a post-route and thus make sure that the eastern terminus should be in the State of Iowa. What the fact of its being a post-route had to do with the eastern terminus of the road, we are unable to see. We have already referred to the fact that in the decision of the *Hall* case (91 U. S., 343)—where this court decided that the eastern terminus of the Union Pacific road was in Council Bluffs,—the court never referred to the question of its being a post-route, and the fact whether it was a post-route or not was absolutely and entirely immaterial in that case. It is perfectly evident by a reference to the act of 1871 that Congress intended by that act to make sure that the eastern terminus of the Union Pacific road should be in Council Bluffs, and the Congress did not do this by any indirect method of referring to some other act making bridges post-routes, but did

it by direct and positive statement in the act of 1871, as follows (Appendix to original brief, page 428):

> "*And provided*, That nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company or its successors from its obligation as established by existing laws."

We submit, therefore, that when Congress passed the act of 1871 and provided therein that in the *use* and protection of the bridge the Union Pacific Company should be empowered, governed, and limited by the act of 1866, it did not have in mind these unimportant matters of detail as to the length of the spans and as to its being a drawbridge, which were otherwise provided for, nor the use of the bridge for compensation which necessarily conflicted with the Union Pacific charter, nor the question of post routes, which was already provided for by act of Congress. It did have in mind the great controlling principle declared in the act of 1871, of making connections between the railroads then constructed or which might thereafter be constructed to the Missouri river from the east and the west.

In view of the fact that, in the act of 1866 and in other acts, Congress had uniformly provided that all railway companies should have a right to the use of these bridges across the waterways, and in view of the fact that in other acts of Congress the act of 1866 had been referred to for the purpose of regulating this use, we are asked to believe that, in this most important bridge connecting this great Government railroad at its eastern terminus, Congress did not have in mind its use by other railway systems.

Again and again it is urged by counsel for the appellant that the object of the act of 1871 was to aid

the Union Pacific Company to construct a bridge, depots, and tracks, for the purpose of making a more perfect connection between the Union Pacific railroad and the railroads terminating on the western boundary of Iowa at the point of the eastern terminus of the Pacific Company's line, to-wit, that point fixed by the President. And it is argued that this more perfect connection was a more perfect connection than by the rude methods of ice-bridges and ferries. The counsel cites the language of Mr. Justice Strong in *Union Pacific R. Co. v. Hall*, 91 U. S., 343, 346, 350, 352, 353. The court was there alone considering the act of 1862 and the act of 1864. Section 15 of original charter required the Union Pacific to allow any other company to make connection with it, and section 9 of the act of 1864 provided as follows:

> "SEC. 9. *And be it further enacted*, That, to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri river and other rivers which its road may pass in its course, and authority is hereby given said corporation to construct bridges over said Missouri river," etc.

Then follows provision as to the manner of construction of the bridge over the Missouri river (Appendix, p. 402).

It was evidently the intention of Congress that the Union Pacific Company should make connections with Iowa roads, thus forming continuous lines of communication. This was all the authority needed to substitute a railroad bridge for the ice-bridges and ferries.

When this original legislation was passed, no railroads had been constructed or projected reaching the Missouri river from the West. But in 1871 a differ-

ent condition existed. As said by the Chief Justice in the opinion in the *Rock Island* case:

> "In 1871, several roads had been built from the East to Council Bluffs, and others were building, and roads were in process of construction in Nebraska with Omaha as their terminus."

Then came the act of 1871, which did not provide for a more perfect connection between the Union Pacific and the roads in Iowa, but for a more perfect connection "of any railroads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska," being the same language used in the act of 1866 for the more perfect connection of the railroads built to the opposite sides of the river at Quincy, Illinois. Not for a connection with the Union Pacific, but the property was to be constructed to be used to connect all railroads.

It was not this language Mr. Justice Strong was construing in the *Hall* case, but the language of the original charter and the amendment of 1864, to find out whether it was not the intention of Congress to compel the Union Pacific Company to make its eastern terminus in Iowa, and therefore to bridge the river and to operate the line as a whole. It therefore is evident that Congress, in 1871, had a different condition to deal with, and, as a condition of this grant, required something more of the Union Pacific Company than was required in its original charter.

Illinois and St. Louis bridge subject to use by other roads.

On page 64 *et seq.* of counsel's brief it is argued that in referring to the act of 1866 by the act of 1871, Congress had reference only to provisions which were general in their character, and not those which were special, and did not apply to all of the sections of the act. And that as the provision for the use of the bridge by other companies was not contained in section eleven, it was therefore special and not general. We claimed in our original brief (Appendix,

page 297) that by the charter of the St. Louis and Illinois Bridge Company it was required to allow any other railway company to run its trains over the bridge. But in view of the elaborate argument of the counsel, we submit the following additional considerations:

Section eleven of the act of 1866 (Appendix, page 425) made the bridge of the St. Louis and Illinois Bridge Company "subject to all the conditions contained in said act of incorporation and amendments thereto," thus incorporating into this act the provisions of the charter requiring its use by other railway companies, in lieu of making it subject to the terms and conditions of the first section of the act in relation to the Quincy bridge. Congress was evidently not content to leave this as it existed in the original charter for, in authorizing the bridge, it made it subject to these conditions and stipulations as to use.

When this section eleven was passed, there was only one bridge company in existence, and that was the St. Louis and Illinois Bridge Company, therein referred to. At that time the Illinois and St. Louis Bridge Company had not been chartered.(*) These were passed in 1867 and 1868. So that at the time of the passage of the act of 1866, we are dealing alone with the St. Louis and Illinois Bridge Company, which was incorporated under the laws of Missouri, and confirmed in its corporate powers by the State of Illinois, as recited in section eleven of the act of 1866. By the act of incorporation in Missouri, it obtained the right to build a bridge in that State but no right to build a bridge in Illinois. Where it ob-

(*) NOTE.—The only difference between these two companies is that the words "St. Louis" and "Illinois" are inverted. One was incorporated by the State of Missouri, and the other by Illinois.

tained those rights was by the confirmatory act (Appendix, page 310). Referring to these two acts, it will be seen that the original charter granted by Missouri did not contain the provisions subjecting the bridge to use by other companies, but did contain this provision (Appendix to original brief, page 305):

> "And should said bridge be built with railroad tracks, the said company is hereby authorized to make such terms and rates with railroad companies for the passage of trains of freight and passengers as may be agreed upon between said St. Louis and Illinois Bridge Company and the said railroad companies; and in case of disagreement, the amount of compensation to be paid for passage over said bridge, as aforesaid, shall be determined by five referees," etc.

Referring now to the confirmatory act, it was provided in section one that the persons named in the act of incorporation of the State of Missouri should have the right to organize and form a corporation in accordance with said act, and to construct the bridge with certain modifications, specified. By section three, the bridge is specifically made subject to use by any other railway company, and provision is made for arriving at the compensation; and it is provided that, if it denies any other company this right, it shall forfeit its rights and privileges under this charter. By section eight it is provided that it "shall not make any discrimination, or exercise partiality, in fixing the rates for carrying persons, or freight, or trains, over said bridge." This is the confirmatory act which Congress described in section eleven of the act of 1866, and by its acceptance it became a part of the charter of the St. Louis and Illinois Bridge Company. And, as we have hereto-

fore shown, it has been from that day published by the bridge company as a part of its charter.

It is also worthy of note that, after the incorporation of the Illinois and St. Louis Bridge Company in 1867, and the passage of the consolidation act in 1868, to wit, on July 20, 1868, Congress passed another act (15 Stat., 123) recognizing and declaring the consolidated company to be a corporation by that name, with full power to construct a bridge across the Mississippi river in conformity with the acts of the assemblies of the States of Missouri and Illinois "not inconsistent with the provisions of the act to which this act is amendatory," thereby again imposing the obligations imposed under the original charter.

Congress intended this bridge to be subject to use by other roads.

But the counsel says that, had Congress intended to make this most important provision of the act of 1866 apply to the Omaha bridge, it would have said so in clear and specific terms, and not by indirect and remote reference. We submit that every section of this act, except the eleventh, where a bridge is authorized to be constructed, reference is made to the first section for this important provision, and that, before the passage of the act of 1871, Congress had, in other acts, made like reference to the act of 1866 and other acts authorizing bridges. For instance, on February 21, 1868, Congress passed an act authoriting a bridge across the Mississippi river at La Crosse, Wisconsin, subject fo the terms, conditions, restrictions and requirements of the act of July 25, 1866. And on pages 326 to 333 of appendix to original brief will be found several acts where like reference is made to this or other acts of Congress.

But the argument of counsel shows too much. They claim that the provisions of sections two and three, being in their nature general, apply to all the bridges in the act and therefore are the ones referred to by the act of Congress in the act of 1871. The

provisions of section two could not have applied to the St. Louis bridge, under section eleven, because everything provided for in section two is otherwise provided for in the charter, which is inconsistent with these provisions. To illustrate: The provisions of section two of the act of 1866 provides that the bridge may be built as a draw-bridge, designates the height of spans, etc. This is absolutely inconsistent with section six of the St. Louis and Illinois Bridge Company charter, as amended by the act of February 20, 1865 (Appendix, pages 303, 306). By section six of the latter act, the company is not authorized to build a draw-bridge, but must build it of sufficient height to admit of the passage of steamboats; and the manner of construction of the bridge is fully provided for. Section twelve of the act of 1866 also is not in harmony with this. Again, the tolls and compensation to be received is specifically provided for by section seven of the St. Louis and Illinois Bridge Company charter (Appendix, pages 304, 305). We have seen that prior to 1871 all railroad bridges were created post-routes. So it may be argued with equal confidence that the provisions of sections two and three were special as much as the provisions of section one.

Let us here briefly outline a summary of the reasons why the act of 1866 applied to the Omaha bridge, depot, approaches and tracks in question, and subjected the property to the use of other companies:

(A.) Because this court so held, ten years ago, in the case of *Chicago, Rock Island & Pacific Ry. Co.* v. *Union Pacific Ry. Co.*, 163 *U. S.*, 564. This should ordinarily be sufficient, but as counsel seeks to have that case overruled, we add the following.

(B.) When the act of 1871 was passed, it had become the settled policy of Congress to make all railway bridges across public waterways open to the use

of other companies (Appendix B, page 325 *et seq.* of Original Brief).

(C.) The act of 1871 referred to the act of 1866 in substantially the same manner as other previous acts of Congress had done.

(D.) At the time the act of 1871 was passed, railroads were in process of construction to opposite sides of the Missouri river at Omaha, and it is in evidence that it was the desire of the people of Omaha to make this the crossing of all railways.

(E.) The Union Pacific Company was, by the act of 1862 and the act of 1864, authorized to build a bridge and required to make connections with Iowa railroads in Council Bluffs, so that could not have been the connection referred to and intended by the act of 1871.

(F.) The objects of the construction of the bridge, depots, approaches and tracks connected therewith was, as declared, "for the more perfect connection of any railroads that are or shall be constructed to the Missouri river at or near Council Bluffs, Iowa, and Omaha, Nebraska," being the same language used in the act of 1866, to wit: "For the more perfect connection of any railroads that are or shall be constructed to said river at or opposite said point; and that, when constructed, all trains of all roads terminating at said river at or opposite said point, shall be allowed to cross the said bridge, for reasonable compensation;" therefore presumably intended to accomplish the same object—not a connection with the Union Pacific railroad, but a connection between all roads, according to the letter and spirit of the language. This is the "use * * * of said bridge and property" referred to in the act of 1871.

(G.) If the foregoing provision as to the use of the bridge is not what was referred to in the act of 1871, then nothing could have been referred to, because the provisions of sections two and three of said act

of 1866 could not apply, and there would be no provision of the act of 1866 by which the use of said bridge and property could be governed and limited.

(H.) The negotiations leading up to the donation of $250,000 in bonds by the county and $200,000 in bonds by the city, which were sold and the proceeds used to purchase the grounds for depot, terminals, bridge approaches and tracks, show that the Union Pacific Company and the people of Omaha and Douglass county intended to make this the crossing and connection for all railroads (Original Brief, pages 20 to 30). That contract contained the same recitals as do the act of 1866 and the act of 1871, to wit: "that the parties hereto desire to arrange for the more perfect connection of any railroads that are or shall be constructed to the Missouri river at or near Council Bluffs, Iowa, or Omaha, Nebraska." In consideration of which, the Union Pacific Company agreed to build the bridge and depot, and to allow the trains, cars and engines of all railroads then or thereafter running into and out of Omaha and Council Bluffs to have unobstructed access *to* and over said bridge and its approaches, for reasonable compensation, without discrimination, hindrance, preference or delay—the object being there declared to make a "virtual and operating connection upon said transfer grounds between all railroads desiring such connection which do or may begin or end in or pass through Omaha or Council Bluffs, and the trains and business of said roads."

It is further evidenced by the fact that the Union Pacific Company has for years made like contracts with all other companies; and now treats it, in its time-tables and in its operations, as terminal grounds and yards for the use of all lines of railway.

(I.) That in making the original bridge mortgage of 1871 and the supplemental bridge mortgage of 1885 (Transcript of Pleadings and Orders, pages 66

and 95), and especially in the renewal bridge mortgage (page 101) it is provided in substance that the mortgage includes not only the bridge but the "depots at Council Bluffs and Omaha, aforesaid, and the railroad thereover, and the lines and tracks required to perfect the said bridge, its approaches and appurtenances and to connect the same with the lines of any railroad that are now or shall hereafter be constructed to the Missouri river at Council Bluffs, Iowa, or Omaha, Nebraska," clearly showing that the first and second Pacific companies understood the meaning of the act of Congress.

As we have seen, not only is the practical construction of the parties of great weight, but, in construing a grant or law, the previous history of the legislation, and the circumstances attendant at the time it was made, are important factors (Cavazos *v.* Trevino, 6 Wallace, 773).

II.

The provisions of the bridge act of 1871 did not in any way impair the obligation of the first mortgage of the Union Pacific Railroad Company.

Bridge act, 1871, did not impair Pacific first mortgage.

It seems to us that the *Union Pacific Sinking Fund cases*, 99 U. S., 700, are sufficient authority to sustain the right of Congress to amend the Union Pacific charter, requiring it to allow any other company to run its trains over the bridge and tracks, sufficient to make connections between eastern and western lines. But as the counsel cites many authorities and takes up considerable of their brief in discussing this question, we may be pardoned for making a few suggestions in reply.

It is a sufficient answer to all the argument of counsel that not only did the Union Pacific Railroad

Company accept the provisions of the act of 1871, but the bondholders also accepted it, and cannot now be heard to complain that the act imposed any burden upon the Union Pacific Company. Counsel says, page 117 of Brief:

> "We will admit that as between Congress and the Union Pacific Railroad Company, the bridge could be so burdened by agreement between them, but we contend, as to the first-mortgage bondholders and their vested rights as to the security of the bridge, any such proceeding, unless with their *consent*, would be entirely void and not binding on them."

Again, on page 118 *et seq.*, counsel says:

> "We admit that Congress could depreciate the lien of the United States as to the subsidiary bonds by imposing further burdens on the bridge, as, making it subject to the use of other roads, if so desired; and we also admit that the Union Pacific Railroad Company could agree to depreciate the value of its bridge by accepting the condition that it might be used by any other road desiring it, if it desired; but we contend that, as to the *lien and vested right* which the first-mortgage bondholders acquired by the mortgage of 1865, the value of the property covered by the lien, which included the bridge, could not be impaired or depreciated in any way by Congress or any one else without the consent and acquiescence of said bondholders. That is to say, Congress could not, as to the bondholders, without their consent, impose the burden on this bridge of permitting it to be used by all other roads (as it claimed it endeavored to do by the act of 1871) and thus depreciate to that extent the value of the bondholders' security,

and therefore, as to the bondholders, that provision would be of no force and not binding."

We shall consider these points under two heads:

(1st.) Conceding, for the purposes of this argument, that this law did impose a burden and was something more than a mere regulation of the use of the bridge for a reasonable compensation, still Congress, under its reserve power to "alter, amend or repeal this act" *could* impose this burden; and

(2d.) The Union Pacific Company, having requested Congress to amend its charter in order to authorize it to issue additional bonds, accepted the terms of the act by making the mortgage and these bonds having been used to construct a bridge, depots and line of railway not in existence at the time of the first mortgage was made, and the first-mortgage bondholders, with a full knowledge of all these facts, having foreclosed their mortgage and taken the property, must be considered to have assented to the conditions imposed as an easement or public right upon the property.

FIRST.

Under the first head we will cite some additional authorities, and review some of the cases cited by counsel. See:

United States v. Union Pacific Railway Co, 160 *U. S.*, 36.

Greenwood v. Freight Company, 105 *U. S.*, 13.

Spring Valley Water Works v. Schottler, 110 *U. S.*, 348.

Hamilton Gas Light & Coke Co. v. Hamilton City, 146 *U. S.*, 258.

Louisville Water Co. v. Clark, 143 *U. S.*, 1.

We shall not review these cases at length in the brief, but simply mention the point decided in each.

United States v. Union Pac. Ry. Co., 160 U. S., 36, commented upon.

Counsel cite the case of *United States v. Union Pacific Railway Co.*, 160 U. S., 36, in their brief. The court there held that the reservation of the power to add to, alter, amend or repeal the Union Pacific charter gave Congress the power to annul a contract theretofore entered into between the Union Pacific Railway Company and certain telegraph companies, and to require the Union Pacific Company to construct and operate its own telegraph line. The court will remember that, under the nineteenth section of the Union Pacific charter, it is provided in substance that the railway company was authorized to enter into arrangements with certain telegraph companies, therein named, "and if said arrangement be entered into and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all the purposes of this act, *be held and considered a fulfillment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph.*" The court considered the case as though the Western Union Company was the successor to all the rights of these companies provided for by this section; and held that, while it was a compliance with the charter, that Congress could at any time, in furtherance of its reserve power, require the Union Pacific Company to construct its own telegraph line and could set aside the contracts theretofore made. The court said:

> "On behalf of the telegraph company it is contended that it was beyond the power of Congress to so legislate as 'to impair the contracts, first, that between the United States and the several companies mentioned in the act of 1862; and, second, those between the railway company and this defendant.' We perceive no ground on

which this contention can properly rest. It has already been fully examined. As we have seen, Congress, in the act of 1862, expressly reserved the power not only to alter, amend or repeal this act but to add to its provisions. To what has already been said as to the power of Congress, under this reserved power, we may add that the object of such reservation is to enable the legislative department to protect the public interests, and 'to preserve to the State control over its contract with the corporators, which, without that provision, would be irrepealable and protected from any measure affecting its obligation.' *Tomlinson v. Jessup*, 15 *Wall.* 454, 457, 458."

In *Greenwood v. Freight Company, supra*, this court held, by Mr. Justice Miller, that the reserved power to alter, amend or repeal a charter gave the city of Boston the right to repeal a franchise given to the Marginal Company, and deprive it of the right to maintain its railroad tracks in the street. The court said:

Greenwood v. Freight Co., 105 U. S. 13.

"It results from this view of the subject that whatever right remained in the Marginal Company to its rolling stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, * *it no longer had the right to run its cars through the streets or any of the streets of Boston.* It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

"It was, therefore, in the power of the Massachusetts legislature to grant to another cor-

* Italics are ours.

poration, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company."

Spring Valley Water Works v. Schottler, 110 U. S., 348.

In *Spring Valley Water Works v. Schottler*, *supra*, this court held that under the reserved power of amendment, the legislature had authority to repeal a provision of law under which water works companies were incorporated providing that the rates to be charged for water should be fixed by commissioners to be appointed in part by the water works company and in part by the municipal authorities; and to place in the municipal authorities the sole power to fix the rates.

Hamilton Gas Light & Coke Co. v. Hamilton City, 146 U. S., 258.

In *Hamilton Gas Light & Coke Co. v. Hamilton City*, *supra*, the court had under consideration a grant of the exclusive right to lay pipes for conducting gas in the streets of a city. The court held that the grant was valid at the time made, because there was legislative authority, but that, under the reserved power to amend the law, the legislature could take away the exclusive right. The court said:

> "If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law, of supplying gas light to the city of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion of such a grant, as respects at least its exclusive character, was subject to the power of the legislature, reserved by the State constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant

to a corporation of special privileges, if not forbidden by the constitution, may be a contract, but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking or which has the effect to alter or revoke the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation."

An examination of the authorities cited by counsel will show that they do not in the remotest degree affect the position we take, and several of the cases are in direct conflict with the decisions of this court.

Rice v. Minn. & N. W. R. Co., 1 Black, 360, commented upon.

In the case of *Rice v. Minnesota & Northwestern Railroad Co.*, 1 *Black*, 360, the charter of the Minnesota & Northwestern R. R. Co., chapter 47, Laws of 1854, amended by chapter 48, Laws of 1855, granting the lands to the Minnesota & Northwestern R. R. Co., did not contain any provision authorizing the legislature of the Territory or State of Minnesota to repeal, amend or modify the act until after twenty years from its passage, and then only on payment of damages sustained. This charter is the present charter of the Chicago, Great Western Railway Company, and there was no question involved in the case, of the power of the legislature to amend or repeal a charter or grant under this reserved power. The only question was, whether the grant ever took effect so as to create a contract.

Coast Line R. Co. v. City of Savannah, 30 Fed., 646, commented upon.

The case of *Coast Line R. Co. v. City of Savannah*, 30 *Fed.*, 646, is in direct conflict with the decision of this court in the case of *Sioux City St. Ry. Co. v. Sioux City* 138 *U. S.*, 99, in which this court held that an ordinance authorizing a street railway company to lay its tracks in the street, and providing that it should "pave or macadamize, in the time and manner directed, the space between the rails, and shall thereafter keep the same, between the rails, in good repair, and shall keep in good condition and repair the space between the tracks on all bridges that they cross," did not imply a contract that it should not be required to pay for paving outside the rails, and that, under the reserved power to alter or amend the franchise of the corporation it could be required to pay for paving such other part of the street, thus placing the decision upon two grounds.

Detroit v. Plank Road Co., 43 Mich., 140, commented upon.

In the case of *Detroit v. Plank Road Co.*, 43 *Mich.*, 140, the supreme court of Michigan held that, under the reserved power of amendment, the legislature could not take away from the turnpike company the right to collect any tolls on some two miles of the road, placing this upon the ground that to take away from the company the right to collect tolls on two miles of its road was destroying that much of its property. Manifestly, under the reserved power to alter or amend, and even in the absence of that reserved power, it could regulate the tolls, provided, under the guise of regulation, it did not destroy the property. In the case at bar, the Congress simply regulated the use of the property for reasonable compensation. The acts of 1871 and 1866 do not purport to fix the compensation, but simply provide that the trains of all other roads shall be allowed to use the property for "reasonable compensation."

People v. O'Brien 111 N. Y., 1, commented upon.

The case of *People v. O'Brien*, 111 *N. Y.*, 1, simply holds that under the reserved power of amendment, the legislature had no power to forfeit ties, rails and

other property of the corporation laid in the street pursuant to a franchise granted. If this decision can be construed to go further than this, it is certainly in conflict with the decision of this court in the case of *Greenwood v. Freight Company*, 105 *U. S.*, 103, hereinbefore cited; but that it does not go further is evidenced from the fact that the supreme court of New York cited this case and distinguished it (page 53 of opinion).

Millar v. R. R. Co., 21 Barb., 511, commented upon.

The case of *Millar v. R. R. Co.*, 21 *Barb.*, 513, holds that the reserved power to amend a charter of a railroad company did not authorize the legislature to take any part of the railway for a right of way of a highway or street, without compensation. This case is not an authority that the legislature, under such a power, would not have a right to regulate the use of the railway, by requiring it to take out grade crossings, or to raise its tracks, for such power has been sustained by the courts of many States. See *New York & N. E. R. Co. v. Bristol*, 151 *U. S.*, 556, where the court held that, under a reserved power to alter or amend a charter, the legislature may compel a railway company to elevate its tracks over highways, although by so doing the railway company might be required to go to great expense in building iron viaducts and bridges and in lowering tracks, which would amount to the destruction of private property. It is evident that the exercise of this power might result in enormous expense to the railway company and great loss of its revenue. It is noticeable in this case that the counsel for the railway company cited the case of *People v. O'Brien*, 111 *N. Y.*, 1, in opposition to the right of the legislature of Connecticut to amend the charter of the New York & N. E. R. Co., requiring it to do away with grade crossings.

Orr v. Brackton Co., 81 Ky., 593, commented upon.

The case of *Orr v. Brackton County*, 81 *Ky.*, 593, is in direct conflict with the case of *Close v. Greenwood*

Cemetery, 107 *U. S.*, 466. In the Kentucky case the Supreme Court held that under the power of amendment the legislature could not change the manner of voting stock so as to allow each share of stock one vote. It does not exactly appear how the shares were to be voted under the original charter, but the amendment gave each share of stock a right to one vote. This case cannot be reconciled with *Close v. Greenwood Cemetery*. In that case Congress had incorporated the Greenwood cemetery; the capital stock being represented by 2,500 shares of $50 each, divided among the proprietors according to their respective interests. The trustees were to be elected from among the proprietors, each share being entitled to one vote. Subsequently Congress reduced the number of trustees to five, and provided for the election of three of them by the holders of cemetery lots and two by the original proprietors. The court held that this was within the reserved power of Congress to amend the charter, citing the *Sinking Fund* and other cases.

Johnson v. Goodyear Min. Co., 127 Calif., 4, commented upon.

The case of *Johnson v. Goodyear Mining Co.*, 127 *Cal.*, 4, has no bearing on this case. The statute considered in that case required all corporations to pay their employees once a month, and for a violation of the act they were given a lien on all the property of the corporation. Heavy penalties were also imposed. The court simply held that the act violated the fourteenth amendment, denying to corporations the equal protection of the laws. It is perfectly evident that, under the guise of amending the charter, the legislature could not take away the rights of persons guaranteed under the Constitution of the United States.

Use of property taken for reasonable compensation.

Much is said in this branch of the argument about the Union Pacific property being "*taken*" and "*confiscated*" by this act. No property of the Union Pacific Company has been taken. All that Congress

required by the acts of 1871 and 1866 was that "all trains of all roads terminating at said river at or opposite said point shall be allowed to cross said bridge for reasonable compensation" (Act of 1866, page 9 of Original Brief). This court held in the *Rock Island* case, 163 *U. S.*, 583, 584, that the contract, which the counsel say was followed in this decree, was not a lease of the property; that it did not take from the Union Pacific Company its property, nor the possession thereof; that it merely regulated its use for compensation; that it was what was known as a "running arrangement" or "terminal contract," rather than a lease (page 583 of opinion). The Union Pacific Company makes no claim that the compensation is not reasonable. It is the same compensation charged other companies for like use. It is a well-known fact that it is very common for railway companies to grant running rights over terminals in crowded cities. It is the rule rather than the exception. Can it be possible that, under the reserved power to add to, alter, amend or repeal the charter of the Union Pacific Company, Congress had not power, when granting to it valuable rights, to require it to allow other companies to run their trains over the bridge and tracks and to use the terminals? The Union Pacific Company was powerless to build the bridge and terminals, under the mortgages which it had made. It was prohibited from making any other mortgage prior to the Government mortgage. It went to Congress and asked the right to make a $2,500,000 mortgage for the purpose of constructing a bridge and terminals. In granting this right, the Congress recited the fact that it was done in order to make more perfect connections between the railroads that then were or might thereafter be constructed to the Missouri river at or near Council Bluffs and Omaha. And by regulating its use, by the act of 1866, it required the Union Pacific Com-

pany to allow all other railroads to use these facilities, for the purpose of making connections, for reasonable compensation. If this regulation is not within the reserved power of Congress, we fail to see any case in which Congress can make a reasonable regulation of the use of property.

SECOND.

Act of 1871 accepted by first - mortgage bondholders.

The bridge, depot, approaches and tracks, not being in existence at the time the first mortgage was made, but constructed with money procured under the act of 1871, the first mortgage attached to the property as after-acquired property, and subject to all the obligations as to the use thereof imposed by the act of 1871. The bondholders could not accept the benefits of the act without assuming the obligations. This is true, not only as to the bridge, depot and tracks actually constructed with the money procured from the bonds issued under the act of 1871, but of any part of the track between the depot and South Omaha necessary to connect the eastern with the western lines to effectuate the intention of Congress as declared in the act of 1871.

In several places in the brief of counsel, reference is made to the fact that the bridge was commenced prior to the passage of the act of 1871. We cannot see that this would be in any way material. All these facts were before this court in the *Rock Island* case. But there is no evidence that any work was done upon the bridge, depot, tracks or approaches prior to the passage of the act. The answer admits that the money raised by the bridge mortgages

> " was used by the Union Pacific Railroad Company, during the years of 1871 and 1872, in constructing a bridge across the Missouri river, and tracks and depots connected therewith extending from the eastern terminus of the Union

> Pacific Railroad Company at Council Bluffs in the State of Iowa to a point at about Twentieth street in the city of Omaha, Nebraska, a distance of three and ninety-eight hundredths miles" (Record, Pl. and Orders, page 214).

It appears by the testimony of Mr. Dodge that the company was without funds with which to build its bridge across the Missouri river, and that the company sent him to Washington to procure the passage of the act of 1871. The history of the construction of the bridge is stated in the report of the special master in the foreclosure proceedings and in the opinion of Judge Sanborn (Record, pages 352, 830). Judge Sanborn stated in his opinion in the Government foreclosure case that the bridge division, being the line of road between Council Bluffs and Twentieth street, including the bridge and depot, was not constructed at the time of the making of the first mortgage; and Judge Cornish, in his report, states that the railroad company

> "commenced work thereon, * *or in preparation therefor*, in the latter part of the year 1868 and during the year 1869. That after the year 1869 nothing was done upon the work of constructing said bridge until the year 1871."

He then recited the making of the bridge mortgage under the act of 1871, and that the railroad company,

> "with the moneys derived from the sale of said bonds, built and completed a permanent railroad bridge across the Missouri river between Omaha, Nebraska, and Council Bluffs, Iowa, with the approaches and appurtenances thereto, during the years 1871 and 1872, and that the same was completed in the year 1872.

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* Italics are ours.

"29. That such bridge and approaches consisted of grades and railroad tracks extending from the east line of the railroad company's property between Twelfth and Thirteenth avenues in Council Bluffs, Iowa, in a westerly direction to the east bank of the Missouri river to a connection with the bridge; of a permanent railroad bridge across said river to the westerly bank thereof; and of grades and railroad tracks connecting therefrom westerly through Omaha to a connection with the tracks of said railroad company originally constructed by it at a point at about Twentieth street in said city of Omaha, a distance of three and ninety-eight hundredths (3.98) miles. That the same was not certified to the United States under the provisions of the said acts of July 1, 1862, and July 2, 1864, and that no subsidy bonds or patents of lands were delivered by the United States to said railroad company at the time of or after the construction thereof or based specifically thereon" (Record, vol. 2, pages 830, 831, 832).

So that it appears by the only testimony in the case that this entire bridge division from Council Bluffs to Twentieth street, including the bridge, depot and tracks, was constructed after 1871 and with the moneys obtained by the mortgage made pursuant to the authority given in the act of 1871. To be sure, the Union Pacific Company did have a single track from Twentieth street to South Omaha, constructed as a part of its original line, but, after the establishment of the stock-yards at South Omaha in 1883 and 1884, the Union Pacific Company extended its depot tracks from the bridge to South Omaha (pages 39–41, Original Brief). It is, therefore, clear that when the bondholders and their trustee foreclosed the first-mortgage on the Union Pacific property, and obtained that property, they consented to the terms

of the act of 1871 amending the charter of the Union Pacific Company, under which the larger part of the property was acquired. And we call the court's attention to the fact that at the time of the foreclosure of this first mortgage and the purchase of the property under the decree, by the bondholders' committee representing the bondholders, and its acquisition by the present company, this act of 1871 had been construed in the *Rock Island* case to include the property to South Omaha and to require the Union Pacific to allow its use by any other railroad company, so that it bought this property with this construction placed upon the act, and the present company must have accepted the terms thereof.

III.

Form of Decree.

Form of decree.

On pages 128 to 136 of counsels' brief, they attack the form of the decree. It is evident they entirely misconceive its terms. It is claimed that the decree grants to the Mason City Company all of the rights conferred by contracts with other companies. Nothing could be farther from the facts. It will be found that as to the description of the property the use of which is granted to the Mason City Company, and as to certain details of operation which have been adopted as uniform details with all companies, the decree has followed the contracts. Let us mention a few of these details. As to the description of the property, the court granted the Mason City Company the use of just the same property which this court held it was the duty of the Union Pacific Company to allow the other companies to use without a contract. We have not included all of the property and rights conferred on some of the companies. Some of these contracts were made before the decision in the *Rock Island* case; several of them since that decision, and since

the acquisition of the property by the present company, notably the amended Milwaukee contract (Record, vol. 1, page 23), the Northwestern contract (Record, vol. 1, page 31). These contracts were made in the light of the decision, and include the use of the property from Council Bluffs to South Omaha, with the passenger station.

It is claimed that the court should not have granted to the Mason City Company "the full, equal and joint use of the main and passing tracks" of the Union Pacific Company from Council Bluffs to a connection with the other railroads at South Omaha. "The full, equal and joint use" means the right jointly with the Union Pacific and other companies to run the trains, engines and cars of the Mason City Company over these tracks, and to use the depot and its tracks. This was held, in the *Rock Island* case, not to be a lease, but only a "running arrangement" or "terminal contract," whereby the possession was not taken from the Union Pacific Company.

Therefore, this language gives the Mason City Company no more than this court held it was the duty of the Union Pacific Company to give to the Rock Island Company.

As to the "main and passing tracks," anyone at all familiar with railroad operations knows that in a big terminal used by many companies, the passing tracks are necessary for each company to use. And, of course, the more companies using the tracks and the more trains operated, the more necessary becomes the use of the passing tracks. It would not have been full justice to have limited the Mason City Company to the use of but one track, and it would have injured the Union Pacific Company; and the counsel knows would have been impracticable.

It is objected that the Mason City Company is authorized to make connections with the other lines at South Omaha. We have seen that all the rail-

ways reaching Omaha from the West connect with the Union Pacific at this point. This was the very object Congress had in mind in the act of 1871, applying the act of 1866. Instead, therefore, of granting to the Mason City Company the use of the Union Pacific tracks to a definite point (*i. e.*, one and one-half miles south of the depot at South Omaha), as was done in the Rock Island contract, the court properly provided that the Mason City Company should enjoy the use of the tracks to a connection with all the railway companies connecting with the Union Pacific tracks to South Omaha (Record, Pleadings and Orders, p. 261).

Again it is urged that the court should not have granted the use of the depot, that it was no part of the bridge, that it is common knowledge that many railroad bridges are used without depots. We cannot conceive what the latter statement has to do with this case. The act of 1871 was passed to enable the Union Pacific Company to construct the bridge, tracks and depots required to perfect the same. To properly understand this act we must consider the circumstances as they then existed. The Pacific Company was without a bridge, depot and several miles of track necessary for it to build its line to the point fixed by the President as its eastern terminus, in Iowa. It had no means with which to construct it. It could make no mortgage prior to that of the United States. It therefore asked the aid of Congress, and the act of 1871 was passed, reciting that for the purposes of making a connection between the eastern and western lines of railroad that then were or thereafter might be constructed, the company was authorized to issue bonds and secure the same by mortgage on the bridge "*and the tracks and depots required to perfect the same.*" The company which received this aid fully understood the object of Congress, and conveyed not only the bridge but

"*the depots at Council Bluffs and Omaha, aforesaid, and the railroad thereover, and the lines and tracks required to perfect the said bridge, its approaches and appurtenances, and to connect the same with any lines of railroad that are now or shall hereafter be constructed to the Missouri river at Council Bluffs, Iowa, or Omaha, Nebraska.*" The company also asked and received aid from the city of Omaha and county of Douglass. This aid was received in bonds and in cash expended to purchase the ground on which the depot, tracks, bridge and approaches were constructed. The contract contains the same recitals as to connecting the eastern and western lines as the act of Congress; and the sixth clause provides that the use of the bridge and approaches shall be for the same purposes recited in the contract and provided by the act of Congress, and also provides that the object of the clause is to make a virtual and operating connection upon said transfer grounds, between all the railroads desiring such connection which do or may begin or end in, or pass through, Omaha and Council Bluffs, and the trains and business of such roads. And in the deed, the use of the property was limited to the purposes of depot and transfer grounds, right of way, and approaches, for said Missouri River bridge, and subject to the conditions and restrictions contained in the contract. The men who procured this act of Congress made this mortgage and obtained this aid, well knew what was intended, but, as said by Judge Caldwell in 101 Fed. 795:

> "This was the construction placed on the contract by those who made it as long as they were in authority, but in the lapse of years they seemed to have passed out, and 'now there rose up' new men in authority 'which knew not' the meaning of the contract as did those who made it, and hence this lawsuit. But a change in officers cannot be permitted to work a change

in the meaning of the contract long ago settled and agreed upon."

The depot was therefore a part of the property subject to the use provided for by the act of Congress. And the contracts which the company has made, creating it a Union depot for all companies, shows that the company was carrying out its obligations under the act of Congress and to the city of Omaha and county of Douglass.

Referring to these contracts, it will be seen that they are identical in form (Record, vol. 1, pages 23 and 31; Transcript of Pleadings and Orders, page 121, *et seq.*). These contracts necessarily fix the details of operation and the rules and regulations as to running trains, so as to be uniform between all the companies. It was the duty of the court below in entering the decree either to fix the details for the operation of trains or to adopt the system of rules, schedules and details of operation specified by the Union Pacific Company in its contracts with other companies. And it is not a material objection that the court did adopt these provisions, which are presumably the best for all the parties. *Joy v. St. Louis*, 138 U. S. 49 of opinion. In this case it was objected that the details of the manner of use of the right of way could not be specified by a court of equity. The court said:

"The decree of the circuit court is so framed as to execute itself. It finds that the rules and regulations now in force for the running of trains over the right of way and tracks of the Wabash Company, and which are set forth in the record, are reasonable rules and regulations. So long as they are undisturbed, there is no occasion for the action or interposition of the court.

"The fact that the railroads which are to be

allowed, under paragraph 9 of the tripartite agreement, to use the right of way through the park and up to the terminus of the city of St. Louis, are not named in that paragraph, is of no importance. *Wolverhampton Railway Co. v. London & Northwestern Ry.*, L. R. 16 Eq. 433; *Express cases*, 117 U. S. 1; *Railway Co. v. Alling*, 99 U. S. 463.

"Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation."

It will be seen, therefore, that the court was fully justified in taking these uniform contracts with all the roads as the basis for the details of operation, both of the tracks and the Union depot. It was also the duty of the court to fix reasonable compensation. The court adopted the scale of compensation paid by the other companies under their 999 year contracts, as a reasonable compensation; and there was no claim made by the Union Pacific Company that it was not just.

We claim, under the Saunders deed and the act of Congress, that we are entitled to the use of the property without discrimination, hindrance, preference or delay. What the Union Pacific Company granted the use of the property to other companies for, not only before but since the decision in the *Rock Island* case and down to as late as 1898, is very good evidence of a reasonable compensation. And the terms and conditions, which of necessity must

be uniform, adopted by the Union Pacific Company for the operation of this property and the Union depot, are proper rules and regulations to be adopted by the court.

Now it is not true that the Mason City Company has obtained all the rights granted to the other companies. Turning to the Milwaukee contract (Record, vol. 1, page 23), it will be seen that the Union Pacific Company granted it grounds, conveniently located, in South Omaha, on which to construct and maintain, and exclusively use, tracks aggregating three thousand feet in length, for the storage of cars and other purposes, for the term of 999 years. The Mason City Company obtains no such right, although it pays the same compensation as the Milwaukee and other companies.

In lieu of that, the Mason City Company has purchased extensive property near Twentieth street, some of it south of Twentieth street and much of it east of Twentieth street, and has constructed substantial freight terminals, freight houses and elevators, for the accommodation of its freight business, expending therefor more than a half a million dollars.

Again, under section three of the same contract, the Union Pacific Company agrees to receive, deliver and store local freight, for reasonable compensation. This same provision is in all the contracts with the other companies. The Mason City Company has no such right, and the Union Pacific Company not only does not furnish these facilities but it never has, and has refused to. Neither is it true that the Mason City Company enjoys the use of the Union Pacific tracks to industries.

But great stress is laid on the fact that the Mason City Company has a right to connect its tracks in Omaha with the Union Pacific tracks. What use would be the main and passing tracks in Omaha if

it had not a right to connect its freight terminals and freight-houses with those tracks? The whole argument is technical and without merit. Any claim that the Mason City Company will be enabled to make and enforce demands upon the Union Pacific Company which other railroad companies, under their contracts, could not do, is entirely without merit. The Mason City Company and the Chicago Great Western Railway Company (the parent company) have been running their trains, freight and passenger, into Omaha since the entry of this decree in August, 1903, enjoying the same rights as the other companies, to the particular property decreed, without inconvenience, annoyance or injury to the Union Pacific Company, and has been monthly paying for the use thereof.

IV.

Every question which is urged in this court to show that the act of 1866 did not apply to the use of the property in question was urged in the Rock Island case.

Brief in Rock Island case, 168 U. S., 564.

In our main brief we called the court's attention to the fact that every argument advanced by the counsel in this case to show that the act of 1866 did not apply to the bridge and tracks in question, was urged in the Rock Island case. In our argument in the court of appeals we urged that the opinion of this court upon the applicability of the act of 1866 to the property in question was argued by the counsel on both sides in the Rock Island case, and carefully considered by the court. That statement we have reiterated in our brief in this court (page 61). It was stated by the counsel in the court below that this branch of the matter was touched on but little by both court and attorneys. It was further specifically stated as follows:

"On reading statement that the matters provided for in the second and third sections of the act of 1866 were otherwise fully covered in the Pacific Railroad acts, we carefully examined the briefs submitted to the court in that case to find if the points we urged here were presented to the court in connection with the construction of the act of 1871, and we find that they were not urged or considered by the court."

This statement is reiterated by the counsel in this court (page 33 and page 35, Brief). Although we have referred this court to the briefs of counsel filed in the circuit court of appeals and in the Supreme Court of the United States in the *Rock Island* case, yet as the briefs in the circuit court of appeals in that case are probably not within the convenient reach of the court, and as counsel has reiterated this statement with such confidence, we print herewith as an appendix excerpts from the briefs of counsel in the Rock Island case, and leave the court to judge whether or not the distinguished counsel in that case fully and completely argued every question presented on this branch of the cause. Furthermore, the Union Pacific Railroad Company in the Rock Island case especially pleaded that the act of 1871 conferred no power to enter into the contract involved in that suit. The clause of the answer is as follows (C. R. I. & Pac. Ry. *v.* U. P. Ry. Co., Record, vol. 1, page 69):

"Defendant further answering, says that this is a cause arising under the Constitution and laws of the United States, and especially of the said acts of Congress of July 1, 1862, July 2, 1864, and February 24, 1871, and defendant says that its defense herein arises under the Constitution and laws of the United States, and especially under the provisions of the said acts of Congress last hereinbefore referred to. It represents to

the court, that under the true construction, intent and meaning of said acts no power is conferred upon this defendant to enter into any such supposed contract as the one attached to the complaint, and it says that said acts deny to this defendant any right, power or authority to transfer, lease or set over unto any other railroad, corporation, association or person, any of the railway lines, terminal facilities, properties, franchises, privileges or rights of this defendant, and the alleged execution of the said supposed contract by the officers of this defendant was in direct violation of the requirements of the said several acts of Congress; and defendant further shows and represents to the court that the complainant herein insists that this defendant had and has the right under the true construction, intent and meaning of said several acts of Congress to enter into the said contract, and to dispose of, lease and set over its said properties described in said supposed contract, in the manner and form therein provided; wherefore, defendant says that there is a contention between the parties as to the true construction, intent and meaning of the said several acts of Congress, and the determination of this cause depends upon which of the two said constructions contended for the said court shall adopt as the true one."

FRANK B. KELLOGG,
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CORDENIO A. SEVERANCE,
Solicitors and Counsellors for Complainant and Appellee.

APPENDIX TO REPLY BRIEF.

Extracts from Brief for Appellee (Pages 27, 28, and 118 to 127, inclusive), in the United States Circuit Court of Appeals for the Eighth Judicial Circuit, in the Case of Union Pacific Railway Company et al., Appellants, v. Chicago Rock Island and Pacific Railway Company, Appellee.

VI.

Contract Between the Union Pacific Railway Company and the County of Douglas and the City of Omaha in the State of Nebraska.

Saunders' deed stipulation (Record, pp. 140-144).

In 1872 the Union Pacific Railway Company entered into a contract with the county of Douglas and the city of Omaha in the State of Nebraska, the declared purpose of which was "to arrange for the "more perfect connection of any railroads that are "or shall be constructed to the Missouri river at or "near Council Bluffs, Iowa, and Omaha, Nebraska." By this contract the railway company agreed to "construct, complete, and maintain a railroad bridge "over the Missouri river at the said city of Omaha;" and that under proper rates for the valuation "to be "prescribed by the said railroad company," the trains, cars, and engines of all other railroads now or hereafter running into "Council Bluffs and Omaha, "shall have unobstructed access and transit to and "over said bridge and its approaches, and such roads "shall have the right to take or cause to be taken

"their trains, cars, and engines with their freight "and passengers over and across said bridge and the "approaches at reasonable compensation, without "discrimination, hindrance, preference or delay, pro- "vided, however, that the Union Pacific Railway "Company shall in all cases have the option of sub- "stituting its own engines for those of such other "roads in the operating of its said bridge, receiving "reasonable compensation therefor." It was de- clared that the object of this clause was "to make a "virtual and operating connection" upon certain grounds described, in the city of Omaha, "between "all the railroads desiring such connection, which "do or may begin, end or pass through Omaha or "Council Bluffs, and the trains or business of said "roads."

In consideration of these covenants the county of Douglas delivered to said company its bonds having a par value of $250,000 and the said city of Omaha conveyed to it a large body of land, "known as the "depot grounds and the right of way." The deed by which the land was conveyed limited the "use of all "said premises to the legitimate purposes of depot "and transfer grounds, for right of way and ap- "proaches to said Missouri river bridge, subject to "the conditions and restrictions contained in the "contract above recited."

It is stipulated that said deed was "executed and "delivered on the 27th day of January, 1872; and "that the said grantee (the Union Pacific Railroad "Company), and its successor, holds the land and "premises under and by virtue thereof."

THIRD POINT.

(Pp. 118 to 124.)

The Power to Make these Contracts may be Derived Directly from the Language, Policy and Purpose of the Charter Incorporating the Union Pacific Railroad Company, which has since been Consolidated with Other Companies into the Union Pacific Railway Company, and is Ample, on General Principles of Law.

The act of Congress of July 1, 1862, and the act of July 2, 1864, amendatory thereof, originally provided for a railway extending from the 100th meridian to the eastern boundary of California, to be built by a Federal corporation known as the Union Pacific Railroad Company.

12 Stat. at Large' pp. 489, 13 id., p. 356.

The original act, and its amendments, provided for an extension of this line from the eastern boundary of California to the Pacific coast, and also for an eastern extension to Leavenworth, Sioux City and Omaha, or Council Bluffs. The latter known as the Iowa branch, and to be built by the Federal corporation.

This system of railways was provided to be built, first, by a Federal corporation; second, by a California corporation; third, by a Kansas corporation; fourth, by an Iowa, Minnesota, or Dakota corporation, that is to say, corporations organized under the laws of the several States named.

The Supreme Court of the United States has left no doubt of its construction of this scheme of railways, by its language in Union Pacific Railroad Company *v.* Hall:

The Union Pacific Railroad Company v. Hall, 91 U. S. Rep., 345.

> "By the first section of the act of 1862 the Union Pacific Railroad Company was authorized to construct, maintain and enjoy a continuous railroad and telegraph, with the appurte-

nances, from a point on the one hundredth meridian of longitude west from Greenwich to the western boundary of the Territory of Nevada. There it was intended to meet and connect with the line of the Central Pacific Railroad Company of California (sect. 8), thus forming a continuous line to the Pacific ocean. This was the main line. But the same act made provision also for several eastern connections. The ninth section authorized the Leavenworth, Pawnee & Western Railroad Company of Kansas (now the Kansas Pacific) to construct a railroad from the Missouri river, at the mouth of the Kansas river (on the south side thereof, so as to connect with the Pacific railroad of Missouri), to the point of western departure of the Union Pacific on the one-hundredth meridian. Thus provision was made for an eastern connection by an unbroken line of road to St. Louis on the Mississippi. This was not all. By the fourteenth section of the act the Union Pacific was authorized and required 'to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, * * * so as to form a connection with the lines of the said company at some point on the one-hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa.' Thus provisions were made for the Iowa eastern branch of the main line. It was doubtless intended to render possible a connection with any railroad that might thereafter be constructed from the western boundary of Iowa eastward. None was then completed, but a railroad was in progress of construction through the State, from its eastern border to the Missouri river.

"The fourteenth section also made provision for another eastern connection. It enacted that whenever there should be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific (Union Pacific) Railroad Company should be authorized and required to construct a railroad and telegraph from said Sioux City, so as to connect with the Iowa branch or with the main line, at a point not farther west than the one-hundredth meridian of longitude.

"The scheme of the act of Congress, then, is very apparent. It was to secure the connection of the main line by at least three branches, with the Missouri and Iowa railroads, and with a railroad running eastwardly from Sioux City in Iowa, either through that State or through Minnesota."

Here was a system in which Federal and State corporations were used indifferently to effect the purpose of Congress, and the whole tenor and spirit of the act shows that it was the intention of Congress that the system thus outlined should work in harmony and be operated by continuous trains. In other words, the very groundwork and constitution of these acts involved the harmonious and continuous and non-discriminating operation of these lines as a unit.

Accordingly section 15 of the act of July 2, 1864, provided specifically, as if to remove all doubt or question as to the purpose of the scheme, as follows:

"SEC. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the Government are con-

13 U. S. Stat. at Large, p. 362.

cerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others."

This legislation was strengthened and enforced by an amendment to the appropriation act, approved March 3, 1873, giving the circuit court of the United States jurisdiction to hear and determine cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. It is a matter of history that this provision was inserted for the purpose of reaching a refusal on the part of the Union Pacific Railroad Company to interchange business, trains or cars, between the Kansas Pacific, Sioux City and Pacific, and the Central Pacific Railway Company, upon terms demanded, as those companies insisted, by the provisions of the charter of the Union Pacific Company.

18 Stat. at Large, p. 111.

The subsequent act of Congress, approved June 20, 1874, reiterated these obligations, and imposed penalties for the violation thereof, thus showing the purpose and intention of Congress to unify the system.

The effect of all this legislation was to compel the Federal corporation to receive the business of the branch roads, built under State corporations, and to receive its trains and cars upon its own tracks in such manner as to effect a continuous operation of the road built by the Federal corporation and the State corporations.

Union Pacific Railway Company v. Hall, 91 U. S., 366.

The Supreme Court, in the case of Union Pacific Company v. Hall, use this further language:

"From it (that is to say the Union Pacific charter) may reasonably be inferred that the purpose of Congress was to provide for connections of the branches of the main line of the Union Pacific road with railroads running through the States on the east of the Territory, and to provide for those connections within those States, at points at or near their western boundaries. Thus, the northern branch was required to be constructed from Sioux City westward toward the main line; and the southern branch was authorized to build their railroad from the south side of the Kansas river, at its mouth, so as to connect with the Pacific railroad, of Missouri."

Not only a continuous operation of the Federal and branch roads, provided for in the acts of Congress was contemplated, but, according to the Supreme Court, connections with eastern roads, reaching the Missouri river from eastern points, were also contemplated.

With what reason, therefore, can it be said that while it was the purpose of Congress to compel the Federal corporation to receive upon its tracks the trains and cars of State corporations, included in the system of lines from the Missouri river to the Pacific ocean, it was at the same time its intention to deny the power to the Federal corporation of making a terminal or trackage contract with connecting corporations reaching the Missouri river from the East, organized under State laws? Such contracts seem to be in strict accordance with the express language of the Union Pacific charter, and in complete accordance with its policy, as appears from its face, and as interpreted by the Supreme Court.

It is wholly a different question from that which would grow out of a complete abdication, on the

part of the Union Pacific, of its franchises and property and powers as a Federal corporation, by the surrender of the control, management and use of its property to any other corporation. The one would amount to the abandonment of its functions as a corporation for the purpose for which it was organized; the other is in the line of promoting the consummation of the purposes of its charter, the increase and development of the business, and the accommodation of traffic and travel by amicable contracts with connecting eastern roads at the east bank of the Missouri river, in strict accordance with the terms and policy of the act. And, until it can be shown by proof, by overwhelming testimony, that the effect of the pending contracts is to disable the Union Pacific from doing its own business and carrying out the purposes of its charter certainly it cannot be claimed that these contracts are beyond its corporate power.

We think it has been abundantly shown, by proof, that these contracts will facilitate and enhance the purposes of the charter rather than obstruct and destroy them.

This construction is also in harmony with other legislation looking to the removal of obstacles and restrictions upon interstate commerce, and substituting in their place the greatest facilities for continuous transportation and the connection of trunk, continental, or interstate lines in the transaction of the public business.

14 Stat. at Large, p. 66.

The act of Congress, approved June 15, 1866, entitled, "An act to facilitate commerce, postal and military communication among the several States," has a direct and decided bearing on this question. The first section provides as follows:

> "That every railroad company in the United States whose road is operated by steam, its suc-

cessors and assigns, be and is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, Government supplies, mails, freights, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

Directly and closely connected with this provision is an act entitled, "An act to authorize the construc- "tion of certain bridges, and to establish them as "post roads," approved July 25, 1866, at the same session of Congress, and a few days after the passage of the last mentioned act. 14 Stat. at Large 244.

The first section of this act of Congress provides for the construction of a bridge at Quincy, Illinois. Other sections provide for the erection of bridges at other points. And the first section contains the following language: "And that when constructed "all trains of all roads terminating at said river, at "or opposite said point, shall be allowed to cross "said bridge for reasonable compensation, to be "made to the owners of said bridge, under the limita- "tions and conditions hereinafter provided."

These provisions, applied in this case to the Quincy bridge, also to one at Burlington, Keokuk and Dubuque, Iowa, and Kansas City, Missouri—are, by act approved February 24, 1871, applied to the Union Pacific Railroad Company's Missouri river bridge between Council Bluffs and Omaha, which bridge is included in the terms of this contract.

Here, then, so far as a portion of the line, covered by the contract, is concerned, we have not only a grant of power to other roads to cross it, but an unequivocal command predicated upon the general policy of Congress, which is treaceable in all these

acts, to permit and allow, for reasonable compensation, any road, reaching such bridge, from either end, to cross and use the same.

The power to cross is useless, worthless and barren, unless the power to connect with roads connected with said bridge, accompanies the power to cross.

It cannot be presumed that Congress intended by this grant, to confer an unfruitful or worthless power. It evidently, on the contrary, intended in granting the power to cross, to grant, at the same time, the power to make such connections as would render such crossing available, and valuable to the company accepting such grant.

The act of June 15, 1866, "To facilitate commerce," expressly grants the power to connect with the roads of other States, "so far as to form continuous lines "for the transportation of the same to the place of "destination."

Looking at these two acts (the one approved June 15, 1866, and the other, July 25, 1866), can it be doubted that both were in the mind of Congress at the passage of the latter, and that the power to cross and the power to connect were intended to go hand in hand?

In the enactment of the act of February 24, 1871, authorizing the Union Pacific to build a bridge across the Missouri river, between Council Bluffs and Omaha, and providing "that for the use and protec- "tion of said bridge and property, the Union Pacific "Company shall be empowered, governed and lim- "ited by the provisions of the act of July 25, 1866," can it be doubted that the intention was to confer upon the Union Pacific Company the power not only to permit the trains of other roads upon its bridge and connecting tracts, but to authorize it in almost express language, and, certainly, by necessary implication, to make suitable contracts for such crossing and for such connection?

Extract from Brief for Appellee (pages 55 to 69, inclusive), in the Supreme Court of the United States, in the case of Union Pacific Railway Company et al., Appellants, v. Chicago, Rock Island and Pacific Railway Company et al., Appellees.

II.

The provision of the Pacific Railroad acts relating to the bridge over the Missouri river, its construction and operation, impose upon the Union Pacific Company the duty of permitting the Rock Island and any other company to run their engines, cars and trains over the bridge and the tracks between Council Bluffs and South Omaha.

1. The original charter of 1862 impliedly authorized the company to bridge the river at Council Bluffs and Omaha, for it required the construction of the road from its east bank.

Union Pacific R. R. Co. *v.* Hall, 91 U. S., 343.

The amendatory act of 1864 granted this power expressly. Section 9 contains this clause: 'Authority is hereby given said corporation to construct bridges over said Missouri river,' etc.

Railroad Co. *v.* Hall, *supra*.

Union Pacific R. R. Co. *v.* U. S., 117 U. S., 355.

All that these acts contemplated was a bridge for the company's use as a part of its road. No provision was made for other roads or for other business. Nor were any special means provided for the construction of this bridge. Doubtless it was supposed that between the proceeds of its first mortgage, the subsidy of Government bonds which these acts granted, and the stock of the company, it possessed

sufficient means to defray the expense of a structure such as it should require for its own use.

In 1871 the conditions had greatly changed; several roads had been built from the East to the initial point of the Union Pacific at Council Bluffs, and others were building. So too, roads were in process of construction in Nebraska with Omaha as their termini. A bridge sufficient for one company was not likely to answer for all; under these conditions the Omaha bridge act was passed, (16 Stat., 430), the provisions of which, shortly stated, are as follows:

(*a.*) The company is authorized to issue such bonds not exceeding $2,500,000, and to secure the same by mortgage on the bridge and approaches and appurtenances, as may be needful to construct and maintain its bridge, and the tracks and depots required to perfect the same.

(*b.*) The reason for granting this authority is stated to be "for the more perfect connection of any railroads that are or shall be constructed to the Missouri river at or near Council Bluffs, Iowa, and Omaha, Nebraska."

(*c.*) The bridge was to "be so constructed as to provide for ordinary vehicles and travel;" and the company was authorized "to levy and collect tolls for the use of the same."

(*d.*) "For the use and protection of said bridge and property, the Union Pacific Railroad Company shall be empowered, governed and limited by the provisions of the act entitled 'An act to authorize the construction of certain bridges and to establish them as post-roads,' approved July twenty-sixth, eighteen hundred and sixty-six, so far as the same is applicable thereto."

(*e.*) The act further provides that it should not operate to change the initial point of the road, reserved to Congress power to regulate the bridge and

tolls for freight, passengers and local travel and defined the width of the spans, if it were built as a draw-bridge.

This act contemplated a bridge to be used not by the Union Pacific only, but by all roads both in Iowa and Nebraska which ran to it; and not for railroad purposes only, but for ordinary travel as well. Several considerations support this contention.

(1.) That a structure of vastly greater size than one sufficient for the uses of the Union Pacific alone was here provided for, appears from the large sum specially authorized to be raised for its construction and to be secured by a mortgage upon it. While the resources of the company which the acts of '62 and '64 provided were adequate to the construction of such a bridge as they contemplated, special powers seemed necessary in order to raise the money to build such an one as was needed under the new conditions of 1871.

(2.) But this was not left to inference; it was distinctly stated that the authority to issue bonds and secure them by mortgage on the bridge was granted "for the more perfect connection of any railroads that are or shall be constructed to the Missouri river at or near Council Bluffs, Iowa, or Omaha, Nebraska." The perfect connection of Iowa and Nebraska roads could not be effected by means of this bridge unless their trains hauled by their engines ran over it.

(3.) As if to put the matter beyond all doubt, the bridge act of 1866 was incorporated in that of 1871, so as to become a part of it as much as if its pertinent provisions had been set out therein in full. That act in its first section authorized certain persons to "build a bridge across the Mississippi river at Quincy, Illinois, and to lay on and over said bridge railway tracks for the more perfect connection

of any railroads that are or shall be constructed to the said river, at or opposite said point, and that when constructed, all trains of all railroads terminating at said river at or opposite said point, shall be allowed to cross said bridge for reasonable compensation" (14 Stat., 244).

If that clause, modified so as to refer to this bridge had been inserted in the act of 1871, there would be no room to doubt the right of the Rock Island to run its own engines as well as its cars and trains over the bridge. It would in so many words run like this: "For the more perfect connection of any railroads that are or shall be constructed to or near Council Bluffs and Omaha, all trains of such roads shall be allowed to cross said bridge for reasonable compensation."

The consistency of the two acts—that of '66 and that of '71—is worth noticing: the object of both is the same; namely, the more perfect connection of roads running to the bridge on either side of the river; and this common object stated in both shows the diligence of Congress, when enacting the act of '71 to secure this object by incorporating therein by way of reference the provision of the former that all trains of all roads should be allowed to cross the bridge.

A strong light is reflected upon the act of 1871 by a long series of acts of Congress authorizing the construction of bridges across navigable streams dividing two States.

On the 21st of February, 1868, an act was passed authorizing the Southern Minnesota Railroad Company to build across the Mississippi river a bridge subject to the provisions of the act of 1866. Its language is, that the railroad company "is hereby authorized to construct and operate a railroad bridge, * * * subject to all the terms, conditions, restrictions and requirements, and entitled to all the priv-

ileges named in an act approved July 25, 1866, entitled An act to authorize the construction of certain bridges and to establish them as post-roads" (15 Stat., 37).

On the 20th of July of the same year, the Kansas & Missouri River Bridge Company was authorized to build a bridge across the Missouri upon or near the military reservation of Fort Leavenworth, and provided "that, when constructed, all roads terminating at the Missouri river at or near the location of said bridge, shall be allowed to cross said bridge for a reasonable compensation to be paid to the owners thereof." And by the same act the St. Joseph & Kansas City Railroad Company was authorized to build a bridge over the same river at St. Joseph, with all the rights and privileges and subject to all the restrictions, limitations, and conditions contained in the act relating to the Kansas & Missouri Bridge Company" (16 Stat., 121).

On the same day another act was passed authorizing the St. Louis & Illinois Bridge Company to construct a bridge in conformity with the act of 1866 (16 Stat., 123).

On the 27th of July, another act was passed authorizing the construction of a bridge across the Potomac from Georgetown with power to operate a railroad across the same and providing that all railroad companies shall have the same rights over said bridge (16 Stat., 231).

On the 30th of June, 1870, an act was passed authorizing the construction of a bridge across the Niagara with this provision: "And all railroad companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same and of the use of the machinery and fixtures thereof, and of all of the approaches thereto" (16 Stat., 173).

On the 1st of July of that year, the Citizens' Bridge

Company was authorized to build a bridge across the Arkansas at Little Rock with this provision: "All trains of all roads terminating at the Arkansas river at or near the location of said bridge, shall be allowed to cross the bridge for a reasonable compensation to be paid to the owners thereof" (16 Stat., 185).

On the 3rd of March, 1871, a bridge was authorized over the Mississippi at the city of Louisiana, in which it was provided that all railway companies desiring to use the said bridge, shall have and be entitled to equal rights and privileges in the passage of the same (16 Stat., 474).

On the 3d of March of the same year, a bridge across the Wabash was authorized in which it was provided, "that all railway companies desiring to use said bridge shall have and be entitled to equal rights and privileges in the passage of the same" (16 Stat., 599).

It would be tedious to go through all the acts authorizing the construction of bridges, to show that they contained the same provisions in substance as those of the act of 1866. More than eighty such statutes are found in the volumes of the Statutes at Large, beginning with the seventeenth and coming down to the present time, and in all of them substantially the same provision is found. They reveal a settled policy that all structures of this character should allow all connecting roads to cross them with their cars, trains and engines.

It is insisted that the reference in the act of 1871 is only to the second and third sections of that of 1866. This limitation of the terms of reference is inadmissible; for the matter of those sections is sufficiently covered by the other acts. Section 2 of the act of 1866 relates to the character of the structure as a bridge with a draw or one with a continuous span. The act of '64 also defines the character of the Union Pacific bridge. Its ninth section pro-

vides that the bridge "shall be constructed with suitable and proper draws for the passage of steamboats, and shall be built, kept and maintained, at the expense of said company, in such manner as not to impair the usefulness of said river for navigation to any greater extent than such structures of the most approved character necessarily do." In this respect the two acts are substantially the same. But whatever is left at large in the act of '64 is completely covered by the last clause of the act of '71 which defines the width of the spans, if the bridge is a drawbridge; they are to be 250 feet in length in the clear on each side of the central or pivot pier of the draw. The matter of the second section of the act of '66 being covered by the provisions of the acts of '64 and '71, it was useless to incorporate that section in the last act.

And the same is true of the third section of the act of '66. It provides:

(*a.*) That the bridge shall be a lawful structure;

(*b.*) That it shall be recognized as a post-route; and

(*c.*) That the United States shall not be charged higher rates for transportation over it than for transportation over roads leading to it.

The act of '64 by authorizing the construction of the Union Pacific bridge, made it a lawful structure; it was not necessary to say so in so many words. Again, the bridge was a part of the Union Pacific railroad, and as such was a post-route. One of the principal objects of its incorporation was to carry the mails. Still further, the rates for transportation over the bridge were fixed by the act of 1862.

Union Pacific R. R. Co. *v.* United States, 117 U. S., 355.

The three matters provided for in the third section being thus fully covered in the Pacific Railroad

acts there was no need of incorporating it in the act of '71. It is not reasonable construction of that act to restrict its reference to sections two and three of the act of '66 when the matters of those sections are adequately covered by other provisions. To do so is to render the terms of reference of no effect. Section one of the act of '66 is the only clause of that act not covered by the acts of '64 and '71, and we are to read into the act of 1871 this clause of that of 1866: "All trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation."

It is said on the other side that even if it were competent for the Union Pacific to grant to the Rock Island the right to run its trains with its own engines over the bridge, its powers did not extend so far as to grant the same rights over the tracks. The tracks east of the bridge are upon the approach to the structure proper. This is distinctly stated by Mr. Day, an engineer who went over all of the ground and took careful measurements. At page 586 he says that "from the point where the track of the two companies connect to the east end of the bridge there are 109 stations of one hundred feet each; that is, 10,900 feet" and that at the point of connection which he calls "Station 0" there is practically no bank; but that at that point the embankment begins and attains a height of 20 feet at Station 77, from which to the bridge it is very high. This shows that all the way from point of connection to the bridge is an approach. An approach to a bridge is properly a part of it; accordingly, all of the road on the east of the bridge may be dismissed without further remark.

The length of the approach at the west end of the bridge is not shown; and therefore the tracks on that side cannot be disposed of in the same summary way. But we have assistance in the act of 1871, which provides that for the more perfect connection

of the roads east of the river with those west of it, to raise money to construct and maintain the bridge and the tracks and depots, to perfect the same, the company may issue bonds and "secure the same by a mortgage on the bridge and approaches and appurtenances." This places the tracks and depot which perfect the bridge on the same footing as that structure. The map in the pocket of the record shows that the depot is more than a half mile from the west end of the bridge. So far, the power of the Union Pacific to grant to the Rock Island the use of the track is covered by the bridge act. They are easily brought within the general terms 'bridge' as a part of that structure.

From the depot to the point in South Omaha where the tracks of the two companies connect is about four miles; and here, if anywhere, is the difficulty in tracing the power of the Union Pacific so far as it is derived from the bridge act. It is insisted that this distance is a chasm over which we cannot pass; that our trains can run from our road in Council Bluffs over the bridge and its approaches as far as the depot and within sight of our track in Nebraska, but can go no further. It is rather distressing if the powers of the Union Pacific fail us just here. We do not think they do. We think this distance of four miles is reasonably within the terms of the act of 1871, which provide for a connection of roads running near to Omaha. This word 'near' is indefinite, and will, under the circumstances of this case, be satisfied by stretching it over this comparatively short distance.

And this appears to be altogether right when the policy of Congress clearly exhibited in its legislation is considered. Just as in The Union Pacific Railroad Company *v.* Hall, 91 U. S., 343, Mr. Justice Strong deduced from the fact that the Pacific acts required the company to connect with roads in Iowa

the conclusion that the road should be constructed into Iowa so as to permit the connection, so here we may infer from the object of the act of 1871 as stated therein, that the word "near" Omaha should be taken in a liberal sense in furtherance of the objects of Congress.

And this construction is supported by a policy of great interest to assist and assure interstate commerce, which may be discovered in several other acts providing for railroad connections at State boundaries.

The original charter proposed a scheme of great scope, which is described by Mr. Justice Strong in The Union Pacific *v.* Hall, *supra*. Time will not allow more than the most general statement here. There were to be a main trunk, beginning on the 100th meridian, which is about two hundred miles west of Omaha, running west to the Pacific; and three or more branches running from the Missouri river, converging at the eastern initial point of the trunk; one from the mouth of the Kansas; one from Omaha; and one from Sioux City.

Section 12 of the original charter provided that the trunk and all the branches "shall be operated and used for all purposes of communication, travel and transportation, so far as the public and Government are concerned, as one connected continuous line." In section 15 of the amendatory act of 1864 the above recited provision is expanded; and all of the companies were required to operate their several and respective roads together, as one connected continuous line, each affording to the other equal facilities, without discrimination for or against any member of the vast system.

It was intended that each of these branches should connect with the eastern roads. In the case cited it is said "thus provisions were made for the Iowa eastern branch of the main line. It was doubtless in-

tended to render possible a connection with any railroad which might thereafter be constructed from the western boundary of Iowa eastward;" that is to say, the Rock Island and the St. Paul. Again, it is said, "the scheme then of the act of Congress is very apparent. It was to secure the connection of the main line by at least three branches with the Missouri and Iowa railroads." And again, "from it (that is to say the Union Pacific charter) it may reasonably be inferred that the purpose of Congress was to provide for connections of the branches of the main line of the Union Pacific road with railroads running through the States on the east of the Territory and to provide for those connections within those States at points at or near their western boundaries."

This large, wise and well-digested scheme by which eastern roads were brought into connection with the Pacific system was the initiative of the great policy we have mentioned. This act was followed by the "Act to facilitate commercial, postal and military communication among the several States" approved June 15, 1866 (14 Stat., 66), which has been embodied in the Revised Statutes (sec. 5258, R. S.). It provides that, "Every railroad company in the United States, whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon and over its road boats, bridges and ferries, all passengers, troops, Government supplies, mails, freights and property on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination." This provision authorizes different companies to join their tracks and thereby form continuous lines of transportation. This act has been liberally construed (Railroad Co. *v.* Richmond, 19 Wall., 584; Hardy *v.* The Atchison

Railroad Co., 5 Pac. R., 6; Kentucky, etc., Co. *v.* Louisville Co., 37 Fed. R., 567, 629, 633).

On the 24th of July, 1866 (14 Stat., 221), the telegraph act was passed, the terms of which are familiar to the court. Then followed the bridge act of 1866, the Union Pacific bridge act of 1871, the more than eighty bridge acts and the acts incorporating the other transcontinental railroad companies, every one of which, without regard to State boundaries or rivers, contained provisions for railroad connections and continuous lines of transportation. They form a great and interesting body of legislation which is pervaded by a public policy, to advance which a breadth of construction of particular words and clauses is by the best principles required.

In hostility to this great policy, a narrow construction of the act of 1871 is not tolerable; such construction would throw it out of harmony with other legislation and defeat its manifest and beneficent purpose.

Extract from Brief for Appellants (pages 43 to 55, inclusive), in the United States Circuit Court of Appeals for the Eighth Judicial Circuit, in the Case of Union Pacific Railway Company et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee.

NO AUTHORITY TO LEASE OMAHA BRIDGE.

But the complainant may insist that though the Union Pacific had no authority to lease its railroad generally, it did have authority to lease that part of it which is known as its Omaha bridge; and to show such authority will cite the Omaha Bridge act of February 24, 1871, 16 Stat., 430. But unless the

Omaha Bridge act of 1871 in some way releases the Union Pacific from the obligations imposed by the prior acts of July 1, 1862, and July 2, 1864, to operate the Omaha bridge as a part of its railroad, the Omaha bridge cannot be operated in any different manner from the rest of its line of railroad. We shall see that the act of 1871 does not attempt to do so; but, on the contrary, the act expressly provides that nothing in the act shall be construed as releasing the Union Pacific from its obligations as established by existing laws.

Further, even if it were true that a lease of the bridge, or the contract of April 30 and May 1, 1890, so far as the bridge is concerned, were authorized by the act of 1871, yet neither that act nor any other act authorizes a lease or contract for the use by any other company of any other part of the Union Pacific railroad. The contracts purport to grant a joint use not merely of the Omaha bridge, but of the railroad, about eight miles in length, of the Union Pacific between Council Bluffs, South Omaha, and Omaha (contract, art. 1, sec. 1, Record, p. 16); and the rental is stated as a consideration for the entire ten miles of railroad. Hence, the contract of May 1, 1890, is void as to that part of the Union Pacific railroad which is not the Omaha bridge; and as the contract is thus void in part, and the void part and the consideration therefor are not capable of separation from the rest, the contract is void throughout.

We proceed, however, to consider the Omaha Bridge act of February 24, 1871, and to show that it does not authorize the said contracts purporting to grant to complainants the joint use of the bridge.

Object of Omaha Bridge Act.—Before considering the text of that act, it is well to note the exact condition of the legislation down to the date of the act. The construction of the bridge had not only been already fully authorized and required, as above

shown, but the bridge was then partly constructed. This act was passed, as its title states, in order to enable the company to issue a separate series of bonds secured by a separate mortgage on the bridge instead of allowing the company to issue only its regular mortgage bonds at the same rates per mile as they could be issued upon the ordinary parts of its railroad. The obvious reason for this was that the bridge cost a far larger sum per mile than the ordinary railroad. The Omaha Bridge act is as follows

"An Act to Authorize the Union Pacific Railroad Company to Issue its Bonds to Construct a Bridge Across the Missouri River at Omaha, Nebraska, and Council Bluffs, Iowa.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the more perfect connection of any railroads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby authorized to issue such bonds, and to secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress; and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel; and said company may levy and collect tolls and charges for the use of the same; and for the use and protection of said bridge and property, the Union Pacific Railroad Company shall be empowered, governed and limited by the provisions of the act

entitled, 'An act to authorize the construction of certain bridges and to establish them as post roads' approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto: *And provided*, That nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligation as established by existing laws; provided, also, that Congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight, and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars; provided, that if said bridge shall be constructed as a drawbridge, the same shall be constructed with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw." Approved February 24, 1871.

OBLIGATION OF UNION PACIFIC ITSELF TO OPERATE ITS WHOLE LINE OF RAILROAD NOT CHANGED BY OMAHA BRIDGE ACT.

Note that this act provides:

"That nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors from its obligation as established by existing laws."

The eastern terminus of the Union Pacific railroad had been fixed by Executive orders of President Lin-

coln, dated November 17, 1863, and March 7, 1864, upon the Iowa bank of the Missouri river opposite Omaha, in accordance with sec. 14, act July 1, 1862, 12 Stat., 489, above referred to. (See U. P. R. R. Co. vs. Hall, 91 U. S., 343, 349.) "Its obligation as established by existing laws" as is shown by the above extracts from the acts of July 1, 1862, and July 2, 1864, was itself to use and operate its whole line of railroad, including the Omaha bridge; to give the United States the preference in the use of the same; and to pay a percentage of its net earnings to the United States. Upon a failure so to operate its railroad, its rights, privileges and franchises were to be forfeited to the United States. The Omaha Bridge act provides that the act shall not be construed as releasing the Union Pacific from any of these obligations. There is, therefore, clearly no authority in this Omaha Bridge act for the Union Pacific to make the contract or lease now in question, unless such authority be contained in the provision of the act that:

> "For the use and protection of said bridge and property the Union Pacific Railroad Company shall be empowered, governed and limited by the provisions of the act entitled 'An act to authorize the construction of certain bridges, and to establish them as post roads,' approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto."

In regard to this clause, it is to be noted that it is immediately followed and controlled by the proviso above quoted that nothing in the act shall be construed as changing the eastern terminus of the Union Pacific railroad, nor as releasing the company from any of its obligations as established by existing laws. Whatever there may be in the act of July 25, 1866, above mentioned, is therefore controlled by this pro-

viso. There can be no doubt whatever that under the laws existing at the date of the Omaha Bridge act the "obligation" of the Union Pacific was itself to operate its whole line of railroad, including the Omaha bridge, and that it could not release itself from this obligation by attempting to delegate the operation of its railroad or part of its railroad to any other company or person. The Omaha Bridge act expressly provides that nothing contained in it shall release the Union Pacific from this obligation. This is the clear and positive language of the act, and controls anything that may be found in the act of July 25, 1866. The Omaha Bridge act of 1871, therefore, in connection with the act of July 25, 1866, does not authorize the Union Pacific Company to delegate to any other company the duty and obligation to operate its Omaha bridge. We proceed to consider this act of July 25, 1866, in connection with the Omaha Bridge act, and to show that it does not authorize the Union Pacific Company to lease its Omaha bridge; while, as we have already pointed out, *supra*, even if it did authorize a lease of the bridge, neither it nor any other act authorizes the Union Pacific to lease the remaining six or seven miles of the ten miles of its railroad which the contract purports to lease; and, therefore, on that ground the contract is void.

The part of the act of July 25, 1866, which complainant may urge as giving the Union Pacific a right to lease the Omaha bridge, as provided in the alleged contract, is as follows (14 Stat., 244):

> "That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for such purpose to build a bridge across the Mississippi river at Quincy, Illinois, and to lay on and over said bridge railway tracks for the more perfect connection of any railroads that are or shall be

constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge, under the limitations and conditions hereinafter provided. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the district court of the United States of any State in which any portion of said obstruction or bridge touches."

Note that this is purely a *bridge* act. The first section of the act above quoted authorizes the building of a certain bridge across the Mississippi river at Quincy, Illinois. Under this act a bridge could be built by a bridge company, or by an individual or individuals, provided they had the requisite State authority. The object of this section clearly is to authorize the erection of a bridge by any person or corporation at the point named and to provide for the use of this particular bridge. The Omaha Bridge act of 1871, which provides that "for the use and protection of said bridge and property the Union Pacific Railroad Company shall be empowered, governed and limited by the provisions of the act of July 25, 1866, so far as the same is applicable thereto," has no reference to these special provisions of the act of July 25, 1866, which apply only to "said bridge" across the Mississippi river at Quincy, Illinois. The only object of the reference in the Omaha Bridge act to the act of July 25, 1866, as this court has expressly decided, was to make the general provisions of the act of July 25, 1866, apply to the Omaha bridge so far as these general provisions were not inconsistent with the provisions of the acts of

July 1, 1862, and July 2, 1864, and February 24, 1871. The Omaha Bridge act did not intend to make any of the special provisions of the act of July 25, 1866, apply to the Omaha bridge, nor, as the Supreme Court of the United States has expressly decided, did it intend to make even the general provisions of that act apply in any case where they were inconsistent with the provisions of the acts of 1862, 1864 and 1871, above referred to, nor where these acts made sufficient and ample provisions with reference to the Omaha bridge. The only provisions of the act of July 25, 1866, which have any application to the Omaha bridge are sections two and three. Section 2 provides in regard to the character of the structure, the spans of its draw-bridges, opening of draw-bridges, etc. Section 3 provides that the bridge shall be a lawful structure and known as a post-route. Those provisions, which are general in their character, were designed to accomplish two purposes: 1st, to regulate the character and use or operation of the bridges mentioned, as bridges across navigable rivers are generally used and operated, so as not to interfere with navigation; and 2nd, subject to these limitations and provisions, to authorize the bridge and make it a lawful structure where otherwise it might be a nuisance; and 3rd, to make it a post-route with all the protection which the laws of the United States give to such post-route as an agency of the Government. These provisions were intended to apply to the bridges mentioned by whatever person or company they were owned and operated. They apply to the bridges designated in the act of July 25, 1866; and so far as no special provision had been made in the acts of 1862, 1864 and 1871, above referred to, and so far as they were not inconsistent with the provisions of those acts they were intended to apply to the Omaha bridge. This was the purpose and the only purpose of the reference in the act of 1871 to

this act of July 25, 1866. The special provisions of section 1, which apply to the "said bridge" across the Mississippi river at Quincy, Illinois, were not intended to apply to the Omaha bridge. They are inconsistent with the use and operation of the bridge by the Union Pacific, as provided for in the acts of 1862, 1864 and 1871. The proposition of the complainant necessarily must go to this length, that the reference in the Omaha Bridge act of 1871 to the act of July 25, 1866, and provisions of section 1 of that act, above quoted, was intended to authorize and did authorize the Union Pacific Railway Company to transfer its franchise to operate its bridge to another company or companies. The rule of law is clear that such authorization of the transfer of a franchise, which is always personal in its nature, and which cannot be transferred without express statutory authority, must be clear and unequivocal and not left to implication or conjecture. Every intendment will be against construing a statute as authorizing such a transfer unless the authority to make it is unequivocally given. It is too clear for argument that such is not the fact in the present case. The provisions of section 1 of the act of July 25, 1866, are not general but special, and by their terms apply only to the bridge across the Mississippi river at Quincy, Illinois. To construe the reference in the act of February 24, 1871, to this act of 1866, so as to make these provisions, which, by their very terms, apply only to the bridge at Quincy, apply also to the Omaha bridge, is to do violence to all rules of construction. Further, to construe them as authorizing the Union Pacific Railway Company to transfer to other companies the franchise to operate its Omaha bridge is clearly inconsistent with the numerous provisions of the acts of 1862, 1864 and 1871, above referred to.

The Union Pacific Railway Company not only

had full power under the acts of 1862 and 1864 above quoted, to build and operate the Omaha bridge as part of its railroad, but by the act of July 1, 1862, § 14, it was expressly required so to do. The acts of 1862 and 1864 both make special provisions as to the use and operation of the whole line of the Union Pacific railroad. The grants of franchises, of rights of way, of lands and of bond subsidies were all made (act July 1, 1862, § 6, 12 Stat., 489, and *supra*) upon condition that the Union Pacific keep its line of railroad in repair and use; that the Government have the preference in the use of the same; that compensation for Government business be retained and applied to the repayment of United States subsidy, and a percentage of net earnings of the railroad be also likewise applied. All these special provisions apply to the Union Pacific railroad; and the Union Pacific is under obligation to comply with them on penalty of forfeiture. The Omaha Bridge act provides that nothing in it shall be construed as releasing the Union Pacific from these obligations as they existed prior to that act. Now, in order to perform these obligations, the Union Pacific must itself exclusively control and operate its Omaha bridge. Unless it does so, it cannot give the Government the preference in its use, nor can it perform its duties to the public and the Government. All these special provisions of the Union Pacific charter are inconsistent with any use of the bridge by other railroad companies. Therefore, the special provision of the act of July 25, 1866, which by its very terms applies only to "said bridge" at Quincy, Illinois, has no application to the Union Pacific bridge at Omaha. This is so by the ordinary rules of construction, but it is also made doubly sure in the present case by the qualifications in the Omaha Bridge act of 1871, *supra*, which applies to the Omaha bridge the provisions of the act of July 25,

1866, only "so far as the same is applicable thereto." Such operation of the bridge by other companies would disable the Union Pacific from carrying out its charter obligations to the public and to the Government. It would prevent the company from operating or giving the Government the preference in the use of the railroad. If the bridge remains in the hands of the Union Pacific the Government is entitled to control its use, but if the company may make a valid lease the Government has no control over the lessee. It would prevent the Union Pacific from operating its whole line of railroad as expressly required by law as a continuous line of railroad. In short, it would *pro tanto* be an abandonment of its corporate business and corporate property by the Union Pacific. It is perfectly clear, therefore, that the provisions of section 1 of the act of July 25, 1866, have no application to the Omaha bridge.

But we are not left alone to general principles of construction in determining this question. The Supreme Court of the United States has expressly decided that even the general provisions of the act of July 25, 1866, have no application to the Omaha bridge of the Union Pacific Railway Company where provisions have been made by the acts of 1862, 1864 and 1871 above referred to. In the case of Union Pacific Railway Company *vs.* United States, 117 U. S., 355, it was contended by the United States that the provisions of section 3 of the act of July 25, 1866, providing that "upon any bridge coustructed under this act no higher charge shall be made over the same for the mails, troops and the munitions of war of the United States than the rate per mile paid for transportation over the railroads or public highways leading to the said bridge"—applied to the Omaha bridge of the Union Pacific Railway Company, and that the Union Pacific Railway Company under this act could not

charge any greater rate per mile upon its Omaha bridge than upon any other part of its railroad. But the Supreme Court decided that this provision had no application to the Omaha bridge, but that the rates upon that bridge were governed by section 6 of the act of July 1, 1862, which provides "that the Union Pacific Railroad Company should transport mails, troops, munitions of war, supplies, and public stores upon said railroad for the Government * * * at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;" and that under this section the Union Pacific Railway Company could charge the Government a greater rate per mile upon the Omaha bridge than upon the other parts of its railroad provided such rate was fair and reasonable, and did not exceed the rate charged to private parties. In that case the court says (p. 361):

> "The Omaha bridge of the Union Pacific Railway Company was not constructed under the act of 1866. It was constructed under the original acts incorporating the company—the acts of July 1, 1862, and July 2, 1864, and the act of February 24, 1871; and the reference in the last-named act to the act of 1866 was for the purpose of extending the provisions of the latter so far as necessary to confer additional powers upon the railway company for the use and protection of the bridge, and contains no evidence of any intent on the part of Congress to change the rules as to rates of transportation over the line of the railway company as prescribed by section 6 of the act of July 1, 1862."

The substance of this decision was, therefore, that even the general provisions of the act of July 25, 1866, do not apply to the Omaha bridge, but, on the contrary, that that bridge was governed by the pro-

visions of the acts of 1862 and 1864, and 1871, above referred to, wherever such provisions existed. Much less do the special provisions of the act of July 25, 1866—which by their very terms applied only to the bridge across the Mississippi river at Quincy—have any application to the Omaha bridge.

The Union Pacific Railway Company, therefore, had no authority to lease its Omaha bridge or to grant to another company or companies a right to a joint use of that bridge; while, as we show, *supra*, even if it had authority to make a lease or grant of joint use of the Omaha bridge, it had no authority to lease or grant the use of the remaining part of the ten miles of its railroad which the contract of May 1, 1890, purports to grant. For these reasons that contract is void and unenforceable.

Extract from Brief for Appellants (Pages 40 to 58, inclusive), in the Supreme Court of the United States, in the Case of Union Pacific Railway Company et al., Appellants, v. Chicago, Rock Island & Pacific Railway Company et al., Appellees.

IV.

NO CHARTER AUTHORITY TO MAKE THE ALLEGED CONTRACT OF MAY 1, 1890.

The Union Pacific Railway Company had no statute or charter authority to make the contract in question. It is unnecessary to refer at length to the orignal charter of the company, act of July 1, 1862, 12 Stat., 489, or to the various acts amendatory thereof. It is sufficient to say that nowhere in any of these acts is any authority conferred upon the Union Pacific Railway Company to lease any part of its railroad or to make any contract for the joint

use of its railroad by any other company. On the contrary, there are many provisions expressly requiring the Union Pacific Company itself to operate its railroad and telegraph, and to exercise the franchises necessary and incident to such operation. We give here a brief analysis of some of these provisions.

The act of July 1, 1862, § 1, 12 Stat., 489, authorized the Union Pacific Railroad Company to construct and operate what was called the main line of railroad from a point on the 100th meridian of the western boundary of the Territory of Nevada, and was "vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth." Section 6 of the same act provides:

> "SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line and transport mail, troops and munitions of war, supplies and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for the services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, Treasury notes or other evidences of debt against the United States, to

be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

This section was amended by sec. 5 of the act of July 2, 1864, 13 Stat., 356, so

"that only one-half of the compensation for services rendered for the Government by said companies shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said roads."

Section 14 of the same act required the Union Pacific to construct and operate that part of its railroad now in question.

"SEC. 14. *And be it further enacted*, That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions in all respects as are contained in this act for the construction of the said railroad and telegraph first mentioned. * * * Provided, that a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section and to operate said road in the same manner as the main line shall be operated, shall forfeit to the Government of the United States all the rights,

privileges and franchises granted to and conferred upon said company by this act."

Section 17 also of the same act provides for a forfeiture in case the Union Pacific shall fail to keep its railroad in repair and use.

Section 9 of the act of July 2, 1864, 13 Stat., 356, gave special authority to the Union Pacific Railroad Company to construct its bridge over the Missouri river; though, as was decided in Union Pacific R. R. Co. *v.* Hall, 91 U. S., 343, 350, such authority was also sufficiently conferred and construction required by those parts of the act of July 1, 1862, above quoted. Section 9 of the act of July 2, 1864, provides as follows:

> "SECTION 9. *And be it further enacted*, That to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri river and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri river and all other rivers for the convenience of said road."

The charter of the Union Pacific expressly requires the company to operate its whole line of railroad (including the ten miles of railroad with the Omaha bridge, which the alleged contract of May 1, 1890, purports to allow the complainant to operate) as one continuous line. Section 12 of act of July 1, 1862, 12 Stat., 489, provides:

> "The whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation so far as the public and Government are concerned, as one connected, continuous line."

Section 15 of act of July 2, 1864, 13 Stat., 356, also provides:

> "*And be it further enacted*, That the several companies authorized to construct the aforesaid roads, are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and Government are concerned, as one continuous line."

This court, by Mr. Justice Harlan, in United States *vs.* Union Pacific Ry. Co. and Western Union Tel. Co., 160 U. S., 1, 28, says:

> "What we have said as to the objects that Congress intended to accomplish by aiding the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean is based upon sections one to eighteen inclusive, of the act of July 1st, 1862, and upon the provisions of the amendatory acts of July 2nd, 1864, c. 216, and June 20th, 1874, 18 Stat., 111, c. 331. If we look alone to those sections and provisions, the conclusion must be that any company named in the act of 1862 and receiving the aid therein granted by the Government, was required itself, and through its own officers and employees, to construct, maintain and operate both a railroad and telegraph line, and could not assign or transfer to any other corporation its franchises in that regard."

See further in same opinion:

> "In this view it must be held that, by its reservation of authority to add to, alter, amend or repeal the acts in question whenever it chose so to do, Congress, subject to the limitation that rights actually vested or transactions fully consummated, could not be disturbed, intended to

keep within its control the entire subject of railroad and telegraphic communication between the Missouri river and the Pacific ocean, through the agency of corporations created by it, or that had accepted the bounty of the Government. It was never intended that the railroad companies, accepting such bounty, should be able, by any contract or arrangement with telegraph companies, to discharge themselves for all time, and beyond the authority of Congress otherwise to provide, from the obligation to exercise by their officers and agents exclusively, the telegraphic franchises received by them from the National Government."

In addition to the express provisions of the Union Pacific charter above quoted, a special act was passed known as the "continuous-line act," approved June 20, 1874, 18 Stat., 111, as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there shall be, and is hereby, added to the fifteenth section of the act approved July second, eighteen hundred and sixty-four, entitled 'An act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1, eighteen hundred and sixty-two,' the following words, namely:

'And any officer or agent of the company authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control or which he is engaged in operating for all purposes of communication, travel and transportation, so

far as the public and the Government are concerned, as one continuous line, or shall refuse in such operation and use to afford and secure to each of said roads equal advantages and facilities as to rates, time or transportation, without any discrimination of any kind in favor of, or adverse to, the road or business of any or either of said companies, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding one thousand dollars, and may be imprisoned not less than six months. In case of failure or refusal of the Union Pacific Railroad Company, or either of said branches, to comply with the requirements of this act and the acts to which this act is amendatory, the party injured or the party aggrieved may bring an action in the district or circuit court of the United States in the Territory, district or circuit in which any portion of the road of the defendant may be situated, for damages on account of such failure or refusal; and, upon recovery, the plaintiff shall be entitled to judgment for treble the amount of all excess of freight and fares collected by the defendant, and for treble the amount of damages sustained by the plaintiff by such failure or refusal; and for each and every violation of or failure to comply with the requirements of this act, a new cause of action shall arise; and in case of suit in any such Territory, district or circuit, process may be served upon any agent of the defendant found in the Territory, district or circuit in which such suit may be brought, and such service shall be by the court held to be good and sufficient; and it is hereby provided that for all the purposes of said act, and of the acts amendatory thereof, the railway of the Denver Pacific Railway and Tele-

graph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific railroad, to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March third, eighteen hundred and sixty-nine.'"

The "Thurman act," May 7, 1878, 20 Stat., 56, also provides:

"SECTION 11. That if either of said railroad companies shall fail to perform all and singular the requirements of this act and of the acts hereinbefore mentioned, and of any other act relating to said company, to be by it performed, for the period of six months next after such performance may be due, such failure shall operate as a forfeiture of all the rights, privileges, grants and franchises derived or obtained by it from the United States; and it shall be the duty of the Attorney General to cause such forfeiture to be judicially enforced."

The Union Pacific, therefore, is expressly required by its charter and by statute to operate the whole of its railroad as "one continuous line." This requires the Union Pacific to operate its railroad between Council Bluffs and Omaha as a part of "one continuous line," and the company has no authority to delegate to any other company the operation of that part of its road or any other part, for by so doing the Union Pacific would fail to operate its road as one continuous line as it is required to operate it. This court has decided that such is the construction of these charter provisions and statutes, and that the Omaha bridge is part of the Union Pacific railroad, and must be operated as such.

Union Pacific Railroad Company *vs.* Hall, 91 U. S., 343; S. C. in circuit court, 4 Dillon, 479.

See also Union Pacific Ry. Co. *vs.* United States, 117 U. S., 355, 361.

So far, therefore, as the Union Pacific railway generally is concerned, the company had no charter or statute authority to make the alleged contracts.

No Authority to Lease Omaha Bridge.

But the appellees may insist that though the Union Pacific had no authority to lease its railroad generally, it did have authority to lease that part of it which is known as its Omaha bridge; and to show such authority will cite the Omaha Bridge act of February 24, 1871, 16 Stat., 430. But unless the Omaha Bridge act of 1871 in some way releases the Union Pacific from the obligations imposed by the prior acts of July 1, 1862, and July 2, 1864, to operate the Omaha bridge as a part of its railroad, the Omaha bridge cannot be operated in any different manner from the rest of its line of railroad. We shall see that the act of 1871 does not attempt to do so; but, on the contrary, the act expressly provides that nothing in the act shall be construed as releasing the Union Pacific from its obligations as established by existing laws.

Further, even if it were true that a lease of the bridge, or the contract of April 30 and May 1, 1890, so far as the bridge is concerned, were authorized by the act of 1871, yet neither that act nor any other act authorizes a lease or contract for the use by any other company of any other part of the Union Pacific railroad. The contracts purport to grant a joint use not merely of the Omaha bridge, but of the railroad, about eight miles in length, of the Union Pacific between Council Bluffs, South Omaha, and Omaha (contract, art. I, sec. 1, Record, p. 16); and the rental is stated as a consideration for the entire ten miles of railroad. Hence, the contracts are void as to that part of the Union Pacific railroad which is not the Omaha bridge; and as the contract is thus void in part, and the void part and the consideration

therefor are not capable of separation from the rest, the contract is void throughout.

We proceed, however, to consider the Omaha Bridge act of February 24, 1871, and to show that it does not authorize the said contracts purporting to grant to complainants the joint use of the bridge.

OBJECT OF OMAHA BRIDGE ACT.—Before considering the text of that act it is well to note the exact condition of the legislation down to the date of the act. The construction of the bridge had not only been already fully authorized and required, as above shown, but the bridge was then partly constructed. This act was passed, as its title states, in order to enable the company to issue a separate series of bonds secured by a separate mortgage on the bridge instead of allowing the company to issue only its regular mortgage bonds at the same rates per mile as they could be issued upon the ordinary parts of its railroad. The obvious reason for this was that the bridge cost a far larger sum per mile than the ordinary railroad. The Omaha Bridge act is as follows:

"An Act to Authorize the Union Pacific Railroad Company to Issue its Bonds to Construct a Bridge Across the Missouri River at Omaha, Nebraska, and Council Bluffs, Iowa.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the more perfect connection of any railroads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby, authorized to issue such bonds, and to secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to

construct and maintain its bridge over said river and the tracks and depots required to perfect the same, as now authorized by law of Congress; and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel; and said company may levy and collect tolls and charges for the use of the same; and for the use and protection of said bridge and property, the Union Pacific Railroad Company shall be empowered, governed and limited by the provisions of the act entitled, 'An act to authorize the construction of certain bridges, and to establish them as post-roads,' approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto: *And provided*, That nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligation as established by existing laws: *Provided also*, That Congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars: *Provided*, That if said bridge shall be constructed as a draw-bridge, the same shall be constructed with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw."

Approved February 24th, 1871.

OBLIGATION OF UNION PACIFIC ITSELF TO OPERATE ITS WHOLE LINK OF RAILROAD NOT CHANGED BY OMAHA BRIDGE ACT.

Note that this act provides:

> "That nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligation as established by existing laws."

The eastern terminus of the Union Pacific railroad had been fixed by executive orders of President Lincoln, dated November 17, 1863, and March 7, 1864, upon the Iowa bank of the Missouri river opposite Omaha, in accordance with sec. 14, act July 1, 1862, 12 Stat., 489, above referred to (see U. P. R. R. Co. vs. Hall, 91 U. S., 343, 349). "Its obligation as established by existing laws," as is shown by the above extracts from the acts of July 1, 1862, and July 2, 1864, was itself to use and operate its whole line of railroad, including the Omaha bridge; to give the United States the preference in the use of the same; and to pay a percentage of its net earnings to the United States. Upon a failure so to operate its railroad, its rights, privileges and franchises were to be forfeited to the United States. The Omaha Bridge act provides that the act shall not be construed as releasing the Union Pacific from any of these obligations. There is, therefore, clearly no authority in this Omaha Bridge act for the Union Pacific to make the contract or lease now in question, unless such authority be contained in the provision of the act that

> "For the use and protection of said bridge and property the Union Pacific Railroad Company shall be empowered, governed and limited

by the provisions of the act entitled 'An act to authorize the construction of certain bridges, and to establish them as post roads,' approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto."

In regard to this clause, it is to be noted that it is immediately followed and controlled by the proviso above quoted that nothing in the act shall be construed as changing the eastern terminus of the Union Pacific railroad, nor as releasing the company from any of its obligations as established by existing laws. Whatever there may be in the act of July 25, 1866, above mentioned, is therefore controlled by this proviso. There can be no doubt whatever that under the laws existing at the date of the Omaha bridge act the "obligation" of the Union Pacific was itself to operate its whole line of railroad, including the Omaha bridge, and that it could not release itself from this obligation by attempting to delegate the operation of its railroad or part of its railroad to any other company or person. The Omaha bridge act expressly provides that nothing in it contained shall release the Union Pacific from this obligation. This is the clear and positive language of the act, and controls anything that may be found in the act of July 25, 1866. The Omaha bridge act of 1871, therefore, in connection with the act of July 25, 1866, does not authorize the Union Pacific Company to delegate to any other company the duty and obligation to operate its Omaha bridge. We proceed to consider this act of July 25, 1866, in connection with the Omaha bridge act, and to show that it does not authorize the Union Pacific Company to lease its Omaha bridge; while, as we have already pointed out, *supra*, even if it did authorize a lease of the bridge, neither it nor any other act authorizes the Union Pacific to lease the remaining six or seven miles of the ten

miles of its railroad which the contract purports to lease; and, therefore, on that ground the contract is void.

The part of the act of July 25, 1866, which complainant may urge as giving the Union Pacific a right to lease the Omaha bridge, as provided in the alleged contract, is as follows (14 Stat., 244):

> "That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for such purpose to build a bridge across the Mississippi river at Quincy, Illinois, and to lay on and over said bridge railway tracks for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge, under the limitations and conditions hereinafter provided. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the district court of the United States of any State in which any portion of said obstruction or bridge touches."

Note that this is purely a bridge act. The first section of the act above quoted authorizes the building of a certain bridge across the Mississippi river at Quincy, Illinois. Under this act a bridge could be built by a bridge company, or by an individual or individuals, provided they had the requisite State authority. The object of this section clearly is to authorize the erection of a bridge by any person or corporation at the point named and to provide for the use of THIS PARTICULAR BRIDGE. The Omaha bridge act of

1871, which provides that "for use and protection of said bridge and property the Union Pacific Railroad Company shall be empowered, governed and limited by the provisions of the act of July 25, 1866, so far as the same is applicable thereto," has no reference to these special provisions of the act of July 25, 1866, which apply only to "said bridge," across the Mississippi river at Quincy, Illinois. The only object of the reference in the Omaha bridge act to the act of July 25, 1866, as this court has expressly decided, was to make the general provisions of the act of July 25, 1866, apply to the Omaha bridge so far as these general provisions were not inconsistent with the provisions of the acts of July 1, 1862, and July 2, 1864, and February 24, 1871. The Omaha bridge act did not intend to make any of the special provisions of the act of July 25, 1866, apply to the Omaha bridge, nor, as this court has expressly decided, did it intend to make even the general provisions of that act apply in any case where they were inconsistent with the provisions of the acts of 1862, 1864 and 1871, above referred to, nor where these acts made sufficient and ample provisions with reference to the Omaha bridge. The only provisions of the act of July 25, 1866, which have any application to the Omaha bridge are sections two and three. Section 2 provides, in regard to the character of the structure, the spans of its drawbridges, opening of drawbridges, &c. Section 3 provides that the bridge shall be a lawful structure and known as a post route. Those provisions, which are general in their character, were designed to accomplish two purposes—1st, to regulate the character and use or operation of the bridges mentioned, as bridges across navigable rivers are generally used and operated, so as not to interfere with navigation; and, 2d, subject to these limitations and provisions, to authorize the bridge and make it a lawful structure where

otherwise it might be a nuisance; and, 3d, to make it a post route with all the protection which the laws of the United States give to such post route as an agency of the Government. These provisions were intended to apply to the bridges mentioned by whatever person or company they were owned and operated. They apply to the bridges designated in the act of July 25, 1866; and so far as no special provision had been made in the acts of 1862, 1864 and 1871, above referred to, and so far as they were not inconsistent with the provisions of those acts they were intended to apply to the Omaha bridge. This was the purpose and the only purpose of the reference in the act of 1871 to this act of July 25, 1866. The special provisions of section 1, which apply to the "said bridge" across the Mississippi river at Quincy, Illinois, were not intended to apply to the Omaha bridge. They are inconsistent with the use and operation of the bridge by the Union Pacific, as provided for in the acts of 1862, 1864 and 1871. The proposition of the complainant necessarily must go to this length, that the reference in the Omaha bridge act of 1871 to the act of July 25, 1866, and provisions of section 1 of that act, above quoted, was intended to authorize, and did authorize, the Union Pacific Railway Company to transfer its franchise to operate its bridge to another company or other companies. The rule of law is clear that such authorization of the transfer of a franchise, which is always personal in its nature, and which cannot be transferred without express statutory authority, must be clear and unequivocal and not left to implication or conjecture. Every intendment will be against construing a statute as authorizing such a transfer unless the authority to make it is unequivocally given. It is too clear for argument that such is not the fact in the present case. The provisions of section 1 of the act of July 25, 1866, are not

general but special, and by their terms apply only to the bridge across the Mississippi river at Quincy, Illinois. To construe the reference in the act of February 24, 1871, to this act of 1866 so as to make these provisions, which, by their very terms, apply only to the bridge at Quincy, apply also to the Omaha bridge, is to do violence to all rules of construction. Further, to construe them as authorizing the Union Pacific Railway Company to transfer to other companies the franchise to operate its Omaha bridge is clearly inconsistent with the numerous provisions of the acts of 1862, 1864 and 1871 above referred to.

The Union Pacific Railway Company not only had full power under the acts of 1862 and 1864, above quoted, to build and operate the Omaha bridge as part of its railroad, but by the act of July 1, 1862, § 14, it was expressly required so to do. The acts of 1862 and 1864 both made special provisions as to the use and operation of the whole line of the Union Pacific railroad. The grants of franchises, of rights of way, of lands and of bond subsidies were all made (act July 1, 1862, § 6, 12 Stat., 489, and *supra*) upon condition that the Union Pacific keep its line of railroad in repair and use; that the Government have the preference in the use of the same; that compensation for Government business be retained and applied to the repayment of United States subsidy, and a percentage of net earnings of the railroad be also likewise applied. All these special provisions apply to the Union Pacific railroad; and the Union Pacific is under obligation to comply with them on penalty of forfeiture. The Omaha bridge act provides that nothing in it shall be construed as releasing the Union Pacific from these obligations as they existed prior to that act. Now, in order to perform these obligations, the Union Pacific must itself exclusively control and operate its Omaha bridge. Unless it does so, it cannot give the Government the prefer-

ence in its use, nor can it perform its duties to the public and the Government. All these special provisions of the Union Pacific charter are inconsistent with any use of the bridge by other railroad companies. Therefore, the special provision of the act of July 25, 1866, which by its very terms applies only to "said bridge" at Quincy, Illinois, have no application to the Union Pacific bridge at Omaha. This is so by the ordinary rules of construction, but it is also made doubly sure in the present case by the qualifications in the Omaha bridge act of 1871, *supra*, which act applies to the Omaha bridge the provisions of the act of July 25, 1866, only "so far as the same is applicable thereto." Such operation of the bridge by other companies would disable the Union Pacific from carrying out its charter obligations to the public and to the Government. It would prevent the company from operating or giving the Government the preference in the use of the railroad. If the bridge remains in the hands of the Union Pacific the Government is entitled to control its use, but if the company may make a valid lease the Government has no control over the lessee. It would prevent the Union Pacific from operating its whole line of railroad as expressly required by law as a continuous line of railroad. In short, it would *pro tanto* be an abandonment of its corporate business and corporate property by the Union Pacific. It is perfectly clear, therefore, that the provisions of section 1 of the act of July 25, 1866, have no application to the Omaha bridge.

But we are not left alone to general principles of construction in determining this question. This court has expressly decided that even the general provisions of the act of July 25, 1866, have no application to the Omaha bridge of the Union Pacific Railway Company where provisions have been made by the acts of 1862, 1864 and 1871, above re-

ferred to. In the case of Union Pacific Railway Company *vs.* United States, 117 U. S., 355, it was contended by the United States that the provisions of section 3 of the act of July 25, 1866, providing that "upon any bridge constructed under this act no higher charge shall be made over the same for the mails, troops and the munitions of war of the United States than the rate per mile paid for transportation over the railroads or public highways leading to the said bridge"—applied to the Omaha bridge of the Union Pacific Railway Company, and that the Union Pacific Railway Company under this act could not charge any greater rate per mile upon its Omaha bridge than upon any other part of its railroad. But the Supreme Court decided that this provision had no application to the Omaha bridge, but that the rates upon that bridge were governed by section 6 of the act of July 1, 1862, which provides that "the Union Pacific Railroad Company should transport mails, troops, munitions of war, supplies and public stores upon said railroad for the Government * * * at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;" and that under this section the Union Pacific Railway Company could charge the Government a greater rate per mile upon the Omaha bridge than upon other parts of its railroad provided such rate was fair and reasonable and did not exceed the rate charged to private parties. In that case the court says (p. 351):

> "The Omaha bridge of the Union Pacific Railway Company was not constructed under the act of 1866. It was constructed under the original acts incorporating the company—the acts of July 1, 1862, and of July 2, 1864, and the act of February 24, 1871; and the reference in the last-named act to the act of 1866 was for the purpose of extending the provisions of the

latter so far as necessary to confer additional powers upon the railway company for the use and protection of the bridge, and contains no evidence of any intent on the part of Congress to change the rules as to rates of transportation over the line of the railway company as prescribed by section 6 of the act of July 1, 1862."

The substance of this decision was, therefore, that even the general provisions of the act of July 25, 1866, do not apply to the Omaha bridge, but, on the contrary, that that bridge was governed by the provisions of the acts of 1862 and 1864 and 1871, above referred to, wherever such provisions existed. Much less do the special provisions of the act of July 25, 1866,—which by their very terms applied only to the bridge across the Mississippi river at Quincy—have any application to the Omaha bridge.

The Union Pacific Railway Company, therefore, had no authority to lease its Omaha bridge or to grant another company or other companies a right to a joint use of that bridge; while, as we show, *supra*, even if it had authority to make a lease or grant of joint use of the Omaha bridge, it had no authority to lease or grant the use of the remaining part of the ten miles of its railroad which the contracts of April 30 and May 1, 1890, purport to grant. For these reasons those contracts are void and unenforceable.